

**The Nature of the Relationship between American Multinational Corporations and Chinese
Businesses and Its Effect on the Problem of Intellectual Property Law**

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ABSTRACT

Intellectual property rights (IPR) have become a major problem in the relationship between the industrialized West and the developing South, primarily because the West demands that developing countries adopt and enforce Western IPR. Since the relationship between US corporations and Chinese businesses is among the most successful and at the center of the current process of globalization, IPR have been a major cause of conflict and controversy between them and serve as an exemplar for this thesis. I argue, first, that the reason that a large number of Chinese businesses, especially privately-owned small and medium-sized enterprises, infringe foreign IPR lies in the nature of the difference between what have been mostly low-tech traditional Chinese businesses and high-tech industrial economies, to which intellectual property laws belong. Second, I demonstrate that the steady improvement of intellectual property protection in the more successful areas of development in the Chinese economy suggests that the solution for improved IPR protection in China and perhaps other emerging nations will follow, not precede, the development and transformation of a low-tech pre-industrial economy into an industrial high-tech economy.

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INTRODUCTION

The integration of national markets into an international distribution network for goods and services increased rapidly in the late 20th century. This process, now commonly referred to as globalization, is fast becoming the primary driving force shaping the geopolitical landscape of the 21st century.¹The globalization of the world economy is based upon a simple idea: businesses cross national boundaries in order to access regions that offer better climates and/or opportunities for growth and profit and/or lower costs.² Although the basic idea sounds simple enough, its implementation has created many economic, legal and political problems, leading to a new international reality that affects developing as well as developed nations.

¹The term globalization for the purpose of this work is equated with the idea of “economic globalization”. Economic definitions of globalization refer to the integration of national economies into the international economy through trade, foreign direct investment, capital flows, migration, and the spread of technology. For example, Keith Maskus states: “Globalization is the process by which national and regional markets become more tightly integrated through the reduction of governmental and natural barriers to trade, investment and technology flows” See Keith E. Maskus, “The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer”(1998) 109 Duke J. Comp. & int’l L. at 115. Jagdish Bhagwati similarly states: “Economic globalization constitutes the integration of national economies into the international economy through trade, direct foreign investments (by corporations and multinationals), short term capital flows, international flows of workers and humanity generally, and flows of technology...” See Jagdish Bhagwati, *In Defense of Globalization* (New York: Oxford University press, 2004) at pg 1. Also consider the following statement: “Faster and more efficient transportation and communication mechanisms have allowed local economies to extend themselves into the international realm of commerce in the fashion of what has been termed "economic globalization." This trend is accompanied by increased reliance among nations on trading policies of other countries and, in turn, a consequent reduction of orthodox trade barriers between countries.” See Trebilcock & R. Howse, *The Regulation of International Trade* (New York: Routledge, 1995).

²The commonly accepted measure for cross border movement of business is Foreign Direct Investment (FDI). FDI occurs when a business located in one country (the direct investor) invests in a business located in another country (the direct investment enterprise) with the objective of creating a strategic and a lasting relationship. For statistical purposes, it is considered that the lasting interest is evidenced when a direct investor owns 10% or more of the voting power of a direct investment enterprise. In other words, the motivation of the direct investor is to exert some degree of influence over the management of the direct investment enterprise whether or not it entails a controlling interest. Direct investment enterprises are corporations or quasi-corporations which may either be subsidiaries (including branches), in which over 50% of the voting power is held, or associates, in which between 10% and 50% of the voting power is held. See generally OECD, 4th ed., *OECD Benchmark Definition of FDI* (2008), online: <http://www.oecd.org/dataoecd/42/56/43985557.pdf>. See also *infra* note 9.

One of the problems brought about by the globalization process is the treatment of intellectual property rights (IPR) by participants in this process.³ In order to understand the problems surrounding the treatment of IPR, it is necessary to investigate a number of aspects of the current globalization process. The aim of this study is specifically to explore why the concept of intellectual property, which originated in developed industrial Western countries,⁴ is not entirely understood or accepted⁵ by countries that have preindustrial economies⁶ and why that might change.

³“Globalization is one of the most important issues of the day, and intellectual property is one of the most important aspects of globalization, especially as the world moves toward a knowledge economy. How we regulate and manage the production of knowledge and the right of access to knowledge is at the center of how well this new economy, the knowledge economy, works and of who benefits. At stake are both matter of distribution and efficiency” See Joseph E. Stiglitz, “Economic Foundations of Intellectual Property Rights” (2008) 57 Duke L.J. 1693 at para.1695. Also consider the following statement by professor of law, Ruth Okediji: “Globalization thrives on the ascendancy of information as the subject of, and the agency for, socioeconomic activity worldwide. In sum, information and information technology constitute the centripetal forces of globalization.” Ruth Gana Okediji, “Perspectives on Globalization from Developing States: Copyright and Public Welfare in Global Perspective” (1999) 7 IND. J. Global Legal Stud 117 at 134.

⁴See Chapter 2, section 1, below. Otherwise, for a historical perspective on the origin of intellectual property rights see for example Christopher May & Susan K. Sell, *Intellectual Property Rights: A Critical History* (Boulder, Colo. : Lynne Rienner Publishers, 2006) and Susan K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge, UK ; New York, NY : Cambridge University Press, 2003).

⁵Bawa summarizes the developing world perspective on IPR’s:

From a philosophical viewpoint.....while the ideological conception of attaching property rights to products of the mind may be novel to LDCS (least developing countries sic.), it is novel primarily because the conception runs counter to their development objectives rather than because of any inherent moral objection to the concept in and of itself.

According to Bawa the term LDC as it appears in the literature is used interchangeably to refer not only to developing or underdeveloped countries but also to newly industrialized countries. See Rafik Bawa, “The North South Divide Over Intellectual Property” (1997) 6 Dal J. Leg. Stud. 77 at 80.

⁶The term pre-industrial is used here to refer to economies or sections of economies where there is little domestic technological development. These countries are net users or importers of intellectual property and are classified into category 3 of the following definition: “According to Hugh Hansen's categorizations, countries of the world may be divided into three groups in relation to their "production and consumption of intellectual property products." First, there are the developed countries, which are net sellers and exporters of intellectual property. They want to obtain increased value for their exported technology, while seeking to secure worldwide protection. Second, there are the newly developed countries with the resources and industries to become net sellers and exporters. They seek broad worldwide protection in addition to increased domestic protection as an incentive for local industry to develop intellectual property and to compete better at home and abroad. Finally, there are the developing countries and the least developed countries, which are the net users and importers of intellectual property.” Most developing countries, whether pre-industrial or newly industrialized, will fall under category 3 if not in whole, at least in part. See Hugh C. Hansen, “International Copyright: An Unorthodox Analysis” (1996) 29 Vand. J. Transnat'l L. 579 at 592.

It would seem fair to posit at the outset that the interest of many developing countries is to create industrial economies, in some cases with the assistance of the West in the form of technology and knowledge transfer or otherwise.⁷ Industrialized countries, and more specifically Western multinational corporations headquartered in those countries, are willing to exploit this interest by transferring their equipment to, and building factories in, developing countries as part of their foreign direct investment (FDI) activities.⁸ FDI into developing countries involves not only the transfer of plants and equipment by multinationals, but also the transfer of increasingly advanced technologies, technological skills, business know-how, inventions, ideas, trademarks and other forms of

⁷Developing countries have gradually shifted their perception of foreign investment, from a distrust of multinational companies and a call for "a 'new economic order' in the 1960s and 1970s to a generally pro-foreign investment stance today. See Glen Kelley, "Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations" (2001)39 Colum. J. Transnat'L L. 483 at 500. They see investment by foreign companies as a means to stimulate domestic industries, grow the domestic economy, and, most importantly, provide a technological basis for the domestic production of IP. Mikhaelle Schiappacasse, "Intellectual Property Rights in China: Technology Transfers and Economic Development" (2004) 2 Buff. INTELL. Prop. L.J. 164 at 167. Developing countries expect that these advances will lead to increased exports and a more significant role in the global economy. See David Hindmam, "The Effects of Intellectual Property Regimes on Foreign Investment in developing Countries" (2006) 23 Arizona Journal of International and Comparative Law 467 at 469.

⁸Supra note 2. See Maskus, supra note 1 at 1, who defines FDI as "the establishment or acquisition of production subsidiaries abroad by multinational enterprises". However, FDI involves not only the purchase of capital assets, including mergers and acquisitions, joint ventures, buying property, and investing in plants and equipment, but, perhaps more important to developing countries, FDI can include the transfer of advanced technologies, managerial expertise, technological skills, and access to the investing company's global network. See Schiappacasse, *ibid.* at 167. A lot of this is going towards China, India, Brazil and Russia, the BRIC economies, the major emerging markets. So it is not that all developing countries are experiencing this flow of capital, which embodies, of course, technology. See Linda Yueh, "Technological Drivers of BRIC Economies: Public Versus Private Sector Control" (2007) *Northwestern Journal of Technology and Intellectual Property* 1 at 36. For example since the late 1990s, European and U.S. companies such as Siemens, Philips, Nokia, General Electric, and Motorola, as well as, Japanese, Korean, and Taiwanese companies had been moving their production facilities to China. According to some accounts, foreign companies opened 60,000 factories in China between 2000 and 2003, allowing Chinese exports to rise to over 400 billion U.S. dollars in 2003. See "Men and Machines: Technology and Economics Have Already Revolutionized Manufacturing. White-Collar Work Will be Next" *Economist* (13 Jan. 2004), at 5-6. As for current trends in Global FDI inflows, they were approximately US\$1trn in 2009, which was a decline from US\$1.73trn in 2008 and US\$2.09trn in 2007, partly attributed to the global financial crisis. It is the first time emerging markets are experiencing more FDI inflows than developed countries. Lazakekic, "The global economic crisis and FDI flows to emerging markets: for the first time ever, emerging markets are this year set to attract more than half of global FDI flows" *Columbia FDI perspectives* (8 October 2009), online:<http://www.vcc.columbia.edu/content/global-economic-crisis-and-fdi-flows-emerging-markets> at 1. See also UNCTAD, *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development* (Geneva: UNCTAD, 2009).

scientific and technological knowledge⁹ that are often protected by IPR (notably copyrights and patents) and that are also self-evidently a crucial part of industrial production and innovation.¹⁰

When it comes to their respective attitudes to IPR, significant differences still exist between developed and developing countries.¹¹ These differences have been a source of tension between the two parties, and have had a profound effect on political and diplomatic relations.¹² Despite continuous efforts to address that conflict and to arrive at a mutual understanding, the area of intellectual property remains a major impediment to their cooperation.

The difference between industrialized and developing countries in their treatment of IPR is a legal issue, namely a conflict over the degree of protection and the level of enforcement expected by the respective parties.¹³ However, it is also a political and economic issue. In order to understand the conflict, the problem must thus be adequately

⁹Ibid. Also see WTO, Press Release, "Trade and Foreign Direct Investment" (9 Oct. 1996), online: http://www.wto.org/english/news_e/pres96_e/pr057_e.htm. (Stating that FDI is "the most important ... channel through which advanced technology is transferred to developing countries.")

¹⁰ It is these technological innovations (which are protected by intellectual property rights) that create a base for a strong economy and drive long-term economic growth. Michael P. Ryan, "Knowledge-Economy Elites, the International Law of Intellectual Property and Trade, and Economic Development" (2002) 10 *Cardozo J. INT'L & Comp. L.* 271 at 297.

¹¹ The conflict over intellectual property is characterized by a sharp conflict of interests and opinions between developed, industrial countries and less developed countries, otherwise referred to as the North-South conflict. The North insists on a uniform standard of intellectual property protection for all countries and argues that it will stimulate technological innovation in the developing world. The South, or less developed countries, argue that intellectual property rights will cripple the development of local industry and technology by preventing the transfer of technology from the developed world to them. See Bawa, *supra* note 5. See also example Comm'n on Intell. Prop. *Rights, Integrating Intellectual Property Rights and Development Policy* (2002), available at http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf.

¹²Ibid. Though the debate over IP protection is one that takes place between developed countries and less developed countries, a uniformity among parties comprising one side or another does not exist. While a number of developed countries may benefit from and do support increased levels of IP protection, not all developed countries, as a group, are equally supportive and equally determined to establish a uniform standard of protection. The extent of a country's comparative advantage in innovation, as opposed to imitation or adaptation of the innovations of others, is what shapes its strategy toward IP. The U.S. Japan and the EU tend to be strong advocates for a universal IP system. See Bawa *supra* note 5, at 78 -80.

¹³ Ibid.

situated within the context of the global economy and the dynamic of interaction between high-tech industrial and low-tech pre-industrial economies.

To narrow the scope of this study to a manageable size, and because China is the developing country that is benefitting most from globalization,¹⁴ even though it remains the largest IPR infringer worldwide,¹⁵ my analysis deals primarily with the relationship between China and the West, and more specifically between China and the United States. The US was chosen for this thesis as the flag bearer for the West for two main reasons: (i) it is the leading innovator globally and (ii) it is the developed country that is most aggressively arguing for the adoption of universal standards for IPR protection.¹⁶

In order to find a path towards resolving the ongoing dilemma of IPR enforcement in China, it is important to take into full consideration the historical and economic forces involved in the country's massive transformation into a fully industrialized nation. A good grasp by China and the US of the magnitude of this process

¹⁴China has been the world's largest FDI recipient among developing countries since early 1990s and remains the leading destination for FDI. With inflows of \$72 billion, the country is ranked among the world's top three recipients in 2005 (which represents approx. 10% of world investment flows). See UNCTAD, "UNCTAD Investment Brief: Rising FDI into China: The Facts Behind The Numbers" Investment Issues Analysis Branch (2007), online: http://www.unctad.org/en/docs/iteiiamic20075_en.pdf. In 2001, China became the second largest importer in the World, sharing 9.41 percent of the total imports. China has gained a leading position in a number of global markets -it is the worldwide leader in the textile sector and produces seventy percent of all mobile phones, sixty percent of all digital cameras and fifty percent of all computers. It is also the world's largest market for refrigeration and air conditions systems, the second largest energy market and the third largest electronics market. See Wei Shi, *Intellectual Property in the Global Trading System: EU-China Perspective* (Berlin Heidelberg: Springer, 2008) at 4. As of 2010, China is the world's second-largest economy in purchasing power parity terms, and is expected to shortly achieve the same rank at market exchange rates. It already has the world's second-largest manufacturing sector and is the world's largest exporter of goods. OECD, "Economic Survey of China 2010: Achievements, prospects and further challenges" (2010) online: http://www.oecd.org/document/0/0,3343,en_2649_34571_44478336_1_1_1_1,00.html

¹⁵Despite the United States' continued efforts and China's enactment of intellectual property laws, many still perceive China as one of the largest infringing countries in the world, illegally appropriating significant amounts of protected technology and copyrighted materials. See Kate Colpitts Hunter, "Here There Be Pirates: How China is Meeting Its IP Enforcement Obligations Under TRIPS" (2007) 8 San Diego Int'L L.J. 523 at 525.

¹⁶ See Bawa, *supra* note 5, at 80.

and of how it affects the legal environment should aid both legislative and political processes.

According to the IMF, China could surpass the United States as the largest economy in the world by 2016.¹⁷ However, as impressive as this statistic may be, China remains in a transitional phase. In the past few decades, it has been undergoing its own accelerated version of the Industrial Revolution; however, this process has not yet reached completion. Indeed, different regions and different industries across China are at various stages of development. Consequently, the country is in a unique situation: as an emerging superpower, China cannot be dictated to, but it has yet to reach the levels of development that its Western counterparts have long since achieved.

Chinese economic considerations seem informed by the perception, based on a cost/benefit analysis, that, at its current stage of economic development, it has more to gain by exploiting the lack of domestic and international IP regulation (the “flexibilities” of the system) than by fully complying with Western demands. It could also be argued that this is an acknowledgement of the fact that even if the Chinese federal government were determined to enforce IPR nationwide, this action would prove exceedingly difficult because of the colossal market forces that are beyond its control.

However, as China approaches full levels of industrial development throughout its economy, it will increasingly be in its own interest to abide by the rules in order to be a successful player in the game of high-tech markets. As it experiences diminishing returns

¹⁷IMF, *World Economic Outlook* (April 2011), online: <http://www.imf.org/external/pubs/ft/weo/2011/01/pdf/text.pdf>

in exploiting the gaps in the enforcement of IPR, it will gradually want to escape the trap of operating in grey market areas.¹⁸ The cost of inaccessibility to new markets will outweigh the benefits of the short-term higher profit margins associated with trading in unregulated markets. For strategic reasons, China will thus want to overcome these limitations when they arise. Indeed, the higher degree of IPR enforcement in more developed regions is the first sign that this is already occurring.

A multifaceted issue such as this demands a multidisciplinary perspective in order to reach solutions. A strictly legalistic approach has thus far been unsuccessful. Relying solely upon legal means as a panacea to this complex problem not only has proven to be ineffective, but also has prevented the law from performing its important function by removing it from the proper context.

It is thus the aim of this thesis to identify the key causative forces behind the described IPR issue by reframing the problem within the wider scope of globalization as a historical process and by emphasizing the economic aspects. The goal of this work is not to offer a definitive solution, but rather to create a new viewpoint from which thought provoking questions can help improve the decision making process. The merit of this approach lies in the idea that sustainable cooperation cannot exist without mutual understanding.

¹⁸There is a highly significant statistical correlation between the estimated importance of the informal economy as a percentage of total output and levels of economic development. An economy with a \$10,000 higher per capita GDP is associated with having 8% less of output attributed to the informal economy. USAID, OECD, OECD Development Assistance Committee's Network on Poverty Reduction (POVNET), *Removing Barriers to Formalization: The Case for Reform and Emerging Best Practices* (2005), Online: <http://www.oecd.org/dataoecd/36/27/38452590.pdf>

Against this backdrop, this thesis argues that the main cause of China's lack of IPR enforcement is not unique to China, but rather is a phenomenon tied to the country's level of economic development. By using the example of China, this thesis argues that developing countries struggle to enforce IPR because of the differences that exist between low-tech traditional Chinese businesses, on one hand, and high-tech industrial economies, on the other, to which the majority of patents and copyrights belong. However, the steady improvement in the Chinese economy also demonstrates that the best solution - perhaps the only solution - to improving IPR protection in China, and by extrapolation the entire developing world, is the transformation of their low-tech pre-industrial economies into industrial and high-tech economies before they move to maximum IPR protection. In other words, the sequence required by IPR instruments such as the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement may have put the "cart" of high-level IPR protection before the "horse" of economic development, to use a phrase coined by Professor Daniel Gervais.¹⁹ Consequently, this thesis aims to demonstrate that the misuse of IPR in the process of globalization is an economic and social problem, which can only be solved with economic and social development, rather than through a legalistic or pure enforcement-based approach.

I. Organization of this Thesis

This thesis is organized into three chapters. The first chapter reviews the major aspects of globalization in two sections. Section 1 provides an overview of the Western approach to the globalization process and identifies the major players and their interests. Section 2 addresses China's response and specific interests in the globalization process

¹⁹ Edit inserted by Dr. Daniel Gervais (1 March 2012)

by investigating its unique economic and political position in relation to the West. By identifying the major players and the interests that govern the globalization process, we can subsequently determine the role that IPR plays in meeting those interests and better explain each party's approach.

Section 1 of chapter 2 then presents the history and main concepts of IP law to show the direct relationship between IPR and the commercial interests it serves. Section 2 of chapter 2 reviews the TRIPS Agreement, which is the most comprehensive treaty governing international IPR obligations. We focus on identifying the role that TRIPS plays in facilitating globalization and its effectiveness in balancing the competing interests of developed and developing economies. Section 3 of chapter 2 covers the Chinese IP system, which was adopted by the Chinese legal system in response to pressure from the World Trade Organization (WTO). The final section of chapter 2 describes the legal and political conflict between the US and China surrounding the enforcement of IPR in the latter.

The third and final chapter analyzes and discusses the possible relationships between the economic, social and legal aspects in order to explain the nature of the problem of applying and enforcing IP laws between two dynamic partners. We consider China's unique social, historical, cultural and legal traditions in order to rule out their significance in the country's approach to IPR enforcement. I then analyze the dynamic interaction between low-tech pre-industrial economies and high-tech industrial economies and the role of IPR in each in order to conclude that China's level of economic development influences its degree of IPR enforcement. I conclude that the

legislation and enforcement of IPR in the future must first be resolved by social and economic means.

The study concludes about the nature of the social, political and economic forces that play a significant role in the legal treatment of IPR.

II. Comparison with Other Works and Contribution to the Problem

It is important to emphasize the difference between this work and previous studies of IPR in the globalization process and the interaction between the developed and developing world. The majority of those studies have investigated the problem of making IPR universal, that is, accepted by developing and developed countries.²⁰ These studies

²⁰See for example Comm'n on Intell. Prop. Rights supra note 11; Carsten Fink, Keith E. Maskus, *Intellectual Property and Development: Lessons From Recent Economic Research* (Washington D.C.:WorldBank, 2004); Carlos A. Primo Braga, Carsten Fink, "The Relationship between Intellectual Property Rights and Foreign Direct Investment" (1998) 9:1 Duke J. Comp. & Int'l L. 163; Keith E. Maskus, *Intellectual Property Rights in the Global Economy* (Washington D.C.: Institute for International Economics, 2000); Keith E. Maskus, supra note 1; Edwin Mansfield, "Intellectual Property Protection, Direct Investment, and Technology Transfer" (1995) 27 Int'l Fin. Corp.; Edwin Mansfield, *Intellectual Property Protection, Foreign Direct Investment, and Technology Transfer* (Int'l Fin.Corp., Discussion Paper No. 19, 1994); G. Robbani, "Trade Related Aspects of Intellectual Property Rights and Least Developed Countries" (2005) 8 Journal of World Intellectual Property 565; Samantha Wu, "Effective Enforcement of Intellectual Property Rights in China: A Real Possibility" (2006) *Darmouth Law Journal*; Thomas F. Cotter, "Market Fundamentalism and the TRIPS Agreement" (2004) 22 *Cardozo Arts & Ent. L.J.* 307; World Bank, *The Uruguay Round and the Developing Economies* (Will Martin & L. Alan Winters eds., 1995), online: <http://econ.worldbank.org.>; Jean Raymond Homere, "Intellectual Property Rights Can Help Stimulate the Economic Development of Least Developed Countries" (2004)27 *Colum. J.L. & Arts* 277; MikhaelleSchiappacasse, "Intellectual Property Rights in China: Technology Transfers and Economic Development" (2004) 2 *Buff. Intell. Prop. L.J.* 164; Suzanne Scotchmer, "The Political Economy of Intellectual Property Treaties" (2004) 20 *J. L. Econ.& Org.* 415; Robert M. Sherwood, "Global Prospects for the Role of Intellectual Property in Technology Transfer", (2002) 42 *IDEA* 27; Robert M. Sherwood, "Intellectual Property Systems and Investment Stimulation: The Rating Systems in Eighteen Developing Countries" (1997)37 *Idea* 261; Evelyn Su, "The Winners and the Losers: The Agreement on the Trade-Related Aspects of Intellectual Property Rights and Its Effects on Developing Countries" (2000) 23 *Hous. J. Int'l L.* 169; Belay Seyoum, "The Impact of Intellectual Property Rights on Foreign Direct Investment" (1996) 31 *Colum. Bus. L. Rev.* 50; Richard T. Rapp & Richard P. Rozek, *Benefits and Costs of Intellectual Property Protection in Developing Countries* (New York: National Economic Research Associates 1990). All of these studies make a case for some level of protection and enforcement of intellectual property rights in developing countries. This is only a sample but there are a myriad of other studies making the same case. Many, but not all make the following basic arguments: (1) Developed countries have high levels of IPRs protection; (2) Developed country industries are very innovative; (3) if developing countries adopt high levels of IPRs, their industries will be very innovative; (4) if developing countries do not adopt high levels of IPRs, their scientists and other innovators will leave because they will not be adequately rewarded for their innovation; and (5) if developing countries do not adopt high levels of IPRs, then industrialized

have focused on economic arguments about the impact that strong IPR have on attracting technology transfers in the form of FDI by multinational firms.²¹ Most scholars have argued that better protection has positive economic effects on FDI flows, even though they recognize that empirical evidence is limited and often contradictory.²² In order to resolve these contradictions, the majority of academic debates on the international aspects of IPR have centered on the optimal degree of protection and on how to best implement and enforce IPR.²³ The present work is different in that it focuses on observing, understanding and explaining the nature of the problem with IPR in its interaction between economies rather than dealing with the practical issues of protecting IPR.

Moreover, while legal commentators have routinely admonished China for its failure to enforce IPR, and have blamed this lack of enforcement on a host of factors, they have not evaluated whether these factors are unique to China or whether they are

country IPRs-holders will not transfer technology to them. See Frederick M. Abbot, "The WTO TRIPS Agreement and Global Economic Development," (1996) *Chicago-Kent Law Review* 386 at 390

²¹Ibid.

²²Ibid. According to Heracio Teran, the major weakness of these studies is that they make the mistake of equating a correlation in the data for a causal connection between intellectual property protection and foreign direct investment. He points to countries that have a poor record of enforcement of intellectual property rights, such as China and India, which receive the bulk of overseas investments. He claims that these studies have an overly deterministic view of the relationship between investment and enforcement of intellectual property rights and that they often fail to recognize the importance of other factors which encourage investment decisions. Horacio Teran, "Intellectual Property Protection and Offshore Software Development: An analysis of the U.S. Software Industry" (2001) *Minnesota Intellectual Property Review* 1 at 2.

²³It should however be noted that some studies are more cautious about the benefits of improved intellectual property protection. See for example Transnational Corporations and Management Division, United Nations, *Intellectual Property Rights and Foreign Direct Investment* (1993) (stating that prior studies and recent surveys do not provide solid evidence on the relationship between intellectual property rights and foreign direct investment). In addition, other researchers conclude that the costs of intellectual property protection are higher than the benefits and that there is no positive economic outcome stemming from this type of protection. See generally A. Samuel Oddi, "The International Patent System and Third World Development: Reality or Myth?" (1987) *Duke L. J.* 831 at 832. ("[M]any of those studying the international patent system as it relates to developing countries have concluded that it is economically unsound for such countries to have a patent system if an overwhelming majority of patents are granted to foreigners."). See also See Frederick M. Abbot, "The WTO TRIPS Agreement and Global Economic Development," (1996) *Chicago-Kent Law Review* 386 at 391. (pointing out that developing countries without other strong economic attractions, but which granted high levels of IPRs protection (e.g., Nigeria) have not attracted higher levels of FDI than other similarly situated).

individually, or in the aggregate, the driving force behind China's lack of enforcement.

Nor has the ultimate question of whether China's enforcement practices will improve and

what implications that has for IPR generally been addressed.

Chapter 1: Economic Globalization and the Position of the Players

INTRODUCTION

In order to adequately address the current state of IP regulation in China, a brief overview of the major aspects of globalization is necessary to establish the wider context from which the issue can be properly viewed and understood. The following chapter sets out to accomplish this in two sections. The first section summarizes the Western approach to globalization, identifying the major players and driving interests involved. In the second section, China's response to globalization is identified by investigating its unique economic and political position in relation to the west. By setting the geopolitical stage and introducing the major players involved, along with the interests that drive them, we can better grasp the forces guiding the globalization process and therefore, in a properly informed manner, determine the role IPR plays in advancing the respective interests, as well as comprehending and anticipating the actions, of each party.

I. THE WESTERN APPROACH

Although globalization has developed gradually over many years, it has become prominent in all aspects of economic activity in the past two decades.²⁴ From a purely economic standpoint, globalization can be defined as the process of creating a free market for goods and services that includes as many countries as possible by reducing or removing transnational trade barriers.²⁵ Globalization thus implies that (i) all national

²⁴Rapid integration of the world economy occurred in the late nineteenth and early twentieth centuries but today's dramatic change is attributable in part to the degree to which governments have intervened to reduce obstacles to the flow of trade and investment worldwide. Bhagwati, *supra* note 1, at 9

²⁵ See Manfred Steger, *Globalism: The New Market Ideology* (Lanham, Md: Rowman & Littlefield, 2002) at 9-12.

economies should be organized around the principle of the market economy and (ii) all barriers to national trade should be gradually removed.²⁶

This notion of free trade is not a new idea, of course. The success of the Industrial Revolution in the eighteenth century and later emergence of capitalism in Western nations gave rise to intellectual efforts that aimed to understand new economic realities and exploit new trends in production and commerce. The growing realization that capitalist economies need room to expand in order to increase productivity and prosper led to expanding the market for goods and services through free trade and thus an entirely new ideology was created, namely liberalism.

For the greater part of the history of capitalism, liberalism was the dominant political trend in industrialized societies.²⁷ However, social and political factors, such as the Great Depression, rise of the trade unions and socialist movement and the creation of the so-called welfare society reduced the appeal of a pure laissez-faire economy. Finally, the collapse of the former Soviet Union, which signaled the end of the Cold War, removed the last barrier to the expansion of capitalism and heralded the revival of the old economic liberalism, which in the form of neoliberalism became the ideology behind globalization.²⁸ The notion of a global economy determined by international market forces became popular in leading capitalist countries, and this viewpoint was endorsed by international economic institutions such as the International Monetary Fund, World Bank and WTO.²⁹

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Hirst and Thompson, 2nd ed., *Globalization in Question: The International Economy and the Possibility of Governance* (Cambridge, UK: Polity, 1999) at 12. See also Robert L. Kuttner, "Development, Globalization and Law" 26 *Michigan Journal of Int'l L* 19 at 19.

The overarching principle of liberalism, which has always been the ideology of the most successful and most advanced capitalist countries, suggests that humans, being rational and self-interested, can operate and succeed best in competition in a free market economy because this setting maximizes resources and thus personal wealth.³⁰ Thus, free market competition, by promoting economic growth and creating wealth, is the best remedy to poverty and inequality.³¹

Despite the confidence and optimism about the globalization process in the West, however, it quickly became apparent that differences existed in the approaches and economic interests of global participants. Countries can generally be divided into two groups: highly developed industrial capitalist countries and developing nations.³²

Khor argues that developing countries are getting a “raw deal”³³ because capitalist countries use WTO agreements to remove all national barriers and thus force weaker businesses in developing countries to attempt to compete on “equal terms” with powerful multinational corporations.³⁴ Chossudovsky has argued that enforcement of international agreements by the WTO at national and international levels invariably bypasses the democratic process and diminishes the ability of national societies to regulate their own economies.³⁵ He has argued that this deregulation results in the consolidation of a cheap labor export economy that comes at the expense of the destruction of national

³⁰ Ibid.

³¹ In which case, according to law and economics theorists, the purpose of law is simply to maximize the conditions in which free market economics can flourish. See Richard Posner, *Economic Analysis of Law* (1977).

³² Supra note 11.

³³ Martin Khor, *Views from The South* (LPC groups: Canada, 2000) at 7.

³⁴ Ibid.

³⁵ See generally Michel Chossudovsky, "Global Poverty in the Late 20th Century" (1998) 52 *Journal of International Affairs* 1

manufacturing for internal markets.³⁶ The result is that some developing countries suffer economic losses in contrast to the growth and development promised by the WTO.³⁷

In light of their supposed disadvantageous positions, poor countries continuously attempt to negotiate a better deal, often by demanding a degree of protection that can level the playing field with the rich and powerful West.³⁸ However, despite intense negotiations, poor countries have been unable to improve the WTO deal because of their relatively weak bargaining positions.³⁹ Although they are frustrated at missing out on the promised benefits of free trade and the global economy,⁴⁰ and are critical of WTO policies, multinational corporations and the governments of developed nations,⁴¹ poor nations want to improve their relative positions rather than put an end to the globalization process.

Scholars such as Albert Barry find no proof that globalization has positively affected the third world, stating that “it is not obvious that this process has contributed to significantly faster growth, but it is clearly suspect as a contributor to increasing

³⁶ Ibid.

³⁷Ibid. For example, sub-Saharan Africa’s share of world exports halved between 1980 and 2006, falling from 3.9% to 1.9%. The situation is even worse for the African least-developed countries (LDCs) whose aggregate average share fell by one-third from an already meagre 0.06% to 0.024% over the same period. Moreover while exports per capita in middle-income countries have increased strongly, they have slightly decreased in sub-Saharan African low-income countries. The question then becomes why some countries fail to reap the benefits of trade, whether by increasing their exports or their imports. See OECD, *Trading Out of Poverty* (2009), online <http://www.oecd.org/dac/aidfortrade/43242586.pdf> See also Generally Thomas Warren, *Poverty and the WTO: impacts of the Doha Development Agenda* (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan; Washington, DC : World Bank, 2006)

³⁸ Ibid in c. 3 “Making Trade Fair” at 69-101.

³⁹Stiglitz observes:

“Trade liberalization - opening up markets to the free flow of goods and services - was supposed to lead to growth. The evidence is at best mixed. Part of the reason that international trade agreements have been so unsuccessful in promoting growth in poor countries is that they were often unbalanced.”

See Joseph E. Stiglitz, *Making globalization work* (London: Allen Lane, 2006) at 15,16.

³⁹ Ibid.

⁴⁰Ibid.

⁴¹ Ibid.

inequality within countries.”⁴² He concludes that “globalization will substantially benefit certain developing countries, while harming others or benefiting them very little.”⁴³ Some economists have highlighted a lack of evidence of real income growth in developing countries if you remove the burgeoning economies in China and India.⁴⁴

Indeed, it is argued that the beneficiaries of globalization already have competitive economies or are quickly adopting modern technologies; thus, they are becoming “strong enough to influence the terms and conditions under which they trade and receive foreign investment.”⁴⁵ At the same time, the globalization process has forced some developing countries to implement laws that primarily serve the interests of foreign countries.⁴⁶

Since globalization is primarily an economic process, it is natural that its protagonists are multinational business corporations, which, through the growth in economic activity and technological progress, have transformed from national into multinational enterprises. Thus, globalization derives from both the desire for continued expansion and the fact that multinational corporations have the means, skills, knowledge

⁴²Albert Barry, “Who Gains and Who Loses”, edited by Richard Sandbrook, *Civilizing globalization: A Survival Guide* (Albany: State University of New York Press, 2003) at 23..

⁴³ Ibid.

⁴⁴Ibid. 22.

⁴⁵Ibid. at 22.

⁴⁶In the case of IP laws, Since the 1980s, changes in IP rights protection within developing countries have generally been spurred from outside the country. The United States and other developed countries successfully introduced IP protection as a requirement under the General Agreement on Tariffs and Trade (GATT) and its successor, the WTO. This pressure has been moderately successful; developing countries seeking membership in the WTO do change their IP laws to become compliant with the international standards. However, actual implementation of the laws is often lacking. The changes in the law typically amount to little more than lip-service to placate Western trading partners while buying more time for domestic industries to grow, unhampered by restrictions on available technology. See David Hindman, “The Effect of Intellectual Property Regimes on Foreign Investments in Developing Economies” (2006) *Arizona Journal of International and Comparative Law* 467 at para. 480. See also Richard J. Ansson, Jr., “International Intellectual Property Rights, the United States, and the People's Republic of China” (1999)13 *Temp. Int’L &Comp. L.J.* 1 at 9-11. See generally Jonathan C. Spierer, “Intellectual Property in China: Prospectus for New Market Entrants” (1999) 3 *Harv. Asia Q.* 46, online: <http://www.asiaquarterly.com/content/view/44/40/>.

and ability to relocate their business activities to the most favorable regions of the world.⁴⁷ Some scholars have argued that all business corporations act in self-interest, which is to grow and make profit, and they will ignore other interests with impunity as long as they can.⁴⁸ In recent decades, there has been increasing discussion in the public forum regarding the importance of corporate social responsibility (CSR) and current trends indicate that some form of CSR will be ostensibly integrated into the business practices of multinational corporations in the future. However, the underlying basis of economic globalization and the worldwide development of cheap labor industries is predicated upon the deregulation of markets in developing nations, fundamentally undermining the ability of national governments to hold corporations accountable.⁴⁹ Furthermore, international agreements provide what some observers have called “a charter of rights for multinational corporations,”⁵⁰ further derogating the ability of sovereign nations to regulate their national economies. As long as there is an abundance of cheap labor, entry criteria will remain low in developing nations in order to remain competitive with each other. Corporations will therefore have little incentive to make concessions to national governments.⁵¹

⁴⁷“It is easy to understand why multinational corporations have played such a central role in globalization, it takes organization of enormous scope to span the globe, to bring together the markets, technology, and capital of the developed countries with the production capacities of the developing ones”. See Stiglitz, *supra* note 39 at 198.

⁴⁸“The truth is that TNC’s have no desire to help developing countries. Rather, the TNC prefers to be the only game in town and current international policy, such as TRIPs, supports their plan.” See Peter. J. Magic, “International Technology and Intellectual Property Rights” (2003) Online: http://www.cs.utexas.edu/users/fussell/courses/econtech/public-final-papers/Peter_Magic_International_IP_Rights.pdf at 7. “Businesses pursue profits, and that means making money is their first priority. Companies survive by getting costs down in any way they can within the law. They avoid paying taxes when possible; some skimp on health insurance for their workers, many try to limit spending on cleaning up the pollution they create.” See Stiglitz, *supra* note 39 at 188 (

⁴⁹ See Chossudovsky, *supra* note 35.

⁵⁰ *Ibid* at para 56.

⁵¹ *Ibid*

This global expansion of business activity inevitably undermines the traditional concept of national sovereignty,⁵² which affects developing countries more than it does industrialized ones. As discussed, this is because emerging economies are forced to change their legislations in order to accommodate multinational enterprises⁵³ and to comply with international institutions such as the WTO.⁵⁴ By reducing their barriers to trade, such countries have opened their markets to transnational corporations without seeing the expected gains and benefits from freer trade or FDI.⁵⁵ Thus far, only large and politically stable countries such as China and India have experienced significant economic growth and modernization.⁵⁶

⁵² “If the international era was characterized by the liberalization of trade in goods and multilateral cooperation achieved through national and supranational political processes, globalization is denoted almost singularly by its minimization of the role and importance of territorial boundaries and the resulting implications for sovereignty.” See Okediji, *supra* note 3.

⁵³ “With many corporations having more resources at their disposal than developing country governments, it is not surprising that corporate efforts to construct favorable regulatory environments are often successful. Unfortunately, it is all too easy for desperately poor countries, especially countries where governments are not democratically accountable, to succumb to corporate enticement. Multinationals have learned that they can exert greater influence in designing international agreements than they can in designing domestic policies.” See Stiglitz, *supra* note 39, at 197.

⁵⁴ For example, developed countries have attempted to harmonize intellectual property rights worldwide by encouraging the enactment of a number of multinational agreements. Thus, developing countries and least developed countries alike were admonished to strengthen their IPR systems by joining multinational treaties, and complying with the TRIPs requirements in particular. Otherwise, developed countries vowed to impose trade sanctions upon poorer countries that failed to crack down on infringing activities that decreased developed countries' revenues in the international market for intellectual property. Raymond Homere, "Intellectual Property Rights can Help Stimulate the Economic Development of Least Developed Countries" (2004) *Columbia Journal of Law and Arts* 278 at 284. See also Okediji at *supra* note 3.

⁵⁵ See OECD, *Trading Out of Poverty* *supra* note 37. *Ibid.* Those in the developing worlds have an even stronger complaint- globalization has been used to advance a version of market economics that is more extreme, and more reflective of corporate interests, than can be found even in the United States. See Stiglitz, note 39, at 10

⁵⁶ See Barry, *supra* note 46.

II. THE CHINESE RESPONSE

A. China, the WTO and TRIPS

During the final two decades of the 20th century, China embarked on an ambitious plan to develop a modern industrial economy and to become one of the major international economic actors.⁵⁷ Although the West and China were former Cold War adversaries and the US and Europe were concerned about China's long-term strategic plans in the Asia-Pacific area,⁵⁸ the West was generally in favor of China joining the WTO⁵⁹ because such a move would open up the Chinese market to its multinational corporations.⁶⁰ Western companies were not only interested in the huge Chinese market for goods, services and capital investment; they also saw low-cost local labor as an opportunity to move industrial production to China.⁶¹ At the beginning of the 21st century, for instance, wages in China were 20% lower than they were in the Philippines, one-third lower than in Malaysia and one-quarter lower than in Thailand.⁶² At the same time, a huge number of skilled and highly skilled workers entered the Chinese workforce: 30 times more engineers graduate annually in China than they do in Thailand and approximately 2.5 times as many as in Japan.⁶³

⁵⁷ In 1979, China's Communist leaders reopened its markets and allowed people to own private property. See Carlos A. Magarinos and Francisco C. Sercovich, "China's Accession to the WTO: An Overview of Domestic and External Implications" edited by Carlos A. Magarinos and Francisco C. Sercovich, *The WTO: The Birth of a New Catching-Up Strategy* (New York: United Nations Industrial Development Organization, 2002) at 15.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Supachai, P. and Clifford M. L., *China and the WTO- Changing China, Changing WTO* (Singapore: John Wiley and sons (Asia), 2002) at chapter 4, quoted by Magarinos and Sercovich Ibid. at 88. Though, in comparison to other countries, some claim there are specific cultural barriers which limit Chinese ability to integrate into Western management practices. McKinsey Global Institute, *The world at work: Jobs, pay, and skills for 3.5 billion people*, (2012), online at

Prior to its admission into the WTO in December 2001, China was already well on its way to becoming a significant player in the international economy.⁶⁴ For example, GDP growth in the late 20th century was above 10% annually, Chinese international trade was nearly \$300 billion annually and China's foreign exchange reserves were valued at \$130 billion.⁶⁵

However, by joining the WTO, China became an internationally recognized and accepted partner with the full rights and responsibilities of a member of the international economic community. The following list of Chinese concessions illustrates how eager it was to join the WTO:

A reduction in average import tariffs from 24.6% to 9.4% (from 22% to 17.5% for agricultural products and from 25% to 8.9% for industrial products).

The removal of import tariffs for IT products.

Farm subsidies to be capped at 8.5% of production value.

The elimination of import tariffs on computers, semiconductors and other high-tech products.

Substantial opening up of services sectors, including banking, insurance, telecommunications and professional services.

Up to 49% foreign ownership in telecommunication and insurance after three years.

Importers to have own distribution networks.

Full market access for foreign banks within five years (currency business with local enterprises after two years).

Broad reforms relating to transparency, notice, receptivity to feedback from interested parties, uniform application of laws, judicial reviews and enforcement.

Enforcement of the stipulations of numerous WTO agreements, such as traderelated investment measures, trade-related industrial property rights, technical barriers to trade and IT agreements.

The US and other WTO members considering China to be a 'non market economy' for purposes of anti-dumping for 15 years.

Firms from WTO member countries enjoying the same rights to trade as do Chinese enterprises.

⁶⁴ Gary Hufbauer, "China as an Economic Actor on the World Stage: An Overview", in Magarinos and Sercovich *supra* note 62 at 47.

⁶⁵ *Ibid* at 47.

Abolishment of the practice of tiered pricing as well as different treatment for domestically sold and exported goods.⁶⁶

To some, admission into the WTO came at a cost. For example, China “had to agree to amend some hundred and seventy-seven domestic laws and regulations regarding custom administration, foreign investment, intellectual property and services to ensure consistency with WTO obligations.”⁶⁷ However, Long Yongtu, China’s vice-minister of trade and chief WTO negotiator, claimed that although the negotiations leading to China’s membership were tough and painful,⁶⁸ they were successful as a result of the determination to reform and modernize the Chinese economy and Chinese society. In order to achieve that, “Chinese society has to move from the ‘rule of man’ to the ‘rule of law’.”⁶⁹ China’s commitment to the WTO is an important step in that direction because the Chinese decision to observe international rules will create a stable and predictable legal environment for its economy.⁷⁰ Since China’s accession to the WTO, it has been changing and adjusting its laws according to its commitments⁷¹ so that this “market opening should be at the service of market growth and be conducive to domestic economic development.”⁷²

⁶⁶ Ibid at 10-11.

⁶⁷ Ibid.

⁶⁸ Long Yongtu, “Negotiating Entry: Key Lessons learned” in Carlos A. Magarinos and Francisco C. Sercovich, *supra* note 60 at 31.

⁶⁹ Ibid. Establishing a society ruled by law has been a major political aspiration of the Chinese Communist Party (“CCP”) for decades, and the CCP has determined in its official report in the 17th Annual Communist Party Meeting that “the rule of law is a basic requirement for socialist democracy.” See Tang Zhixiang, “Governing by Law is Socialism Democratic Politics’ Basic Requirement” *Human Daily* (17 Jan. 2008), online: <http://hnrh.hnol.net/article/20081/200811793330648186691.html>; See also Chris Buckley “Elite China Think-Tank Issues Political Reform Blueprint” *Reuters* (18 Feb 2008), online: <http://www.reuters.com/article/worldNews/idUSPEK20590720080219> (stating that scholars at the CCP-backed elite think-tank argues for the establishment of a modern civil system and mature democracy, and rule of law in the next three decades).

⁷⁰ See Yongtu, *Supra* note 60 at 31.

⁷¹ Ibid at 27.

⁷² Ibid at 31.

However, the area of IPR remains subject to domestic misuse,⁷³ which is a source of constant conflict between Chinese and Western corporations.⁷⁴ Indeed, Long admitted that negotiations concerning IPR were difficult and that in the end “out of 343 paragraphs, 55 paragraphs covering 15 pages are devoted to an extensive treatment of the ... (TRIPS) regime.”⁷⁵

On one side, Western corporations insist on the full protection that they enjoy in the US and Europe.⁷⁶ On the other, while China agrees in principle that IPR must be abided by, it insists that many hurdles prevent its full implementation.⁷⁷ Many people in China still believe that the protection of IPR is in the interests of developed countries, especially their large transnational corporations, since they control over 80% of the patents, copyrights and know-how rights worldwide.⁷⁸ Thus, emphasis on the enforcement of the relevant laws and regulations aims to preserve the vested interests of the privileged in the West.⁷⁹

Others consider that the provisions of international conventions and treaties, including the TRIPS Agreement, are poorly balanced.⁸⁰ The current debate in the WTO on TRIPS and public health is a case in point. It is difficult to strike a balance between

⁷³On their face, China's laws appear to meet or exceed the standards set by international IP rights treaties, including TRIPS: however IPR enforcement in China still remains weak as of 2011. See Below, Chapter 2, section 4.

⁷⁴ See Yongtu, *Supra* note 60 at 165-167.

⁷⁵ Long Yongtu, “Implications of China’s Entry into the WTO in the field of Intellectual Property Rights” in Carlos A. Magarinos and Francisco C. Sercovich, *supra* note 60 at 165. See generally Jakkrit Kuanpot, “The Political Economy of the TRIPS Agreement: Lessons from Asian Countries” in Bellmann, Dutfield and Melendes-Ortiz, eds, *Development Perspectives on TRIPS, Trade and Sustainability* (London: Earthscan Publications, 2003).

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰*Ibid.* Communication from India, Standards and Principles Concerning the Availability, Scope and Use of Trade -Related Intellectual Property Rights, MTN. GNG/NG11/W/37, 10 July 1980

patent rights and the right of the poor to access basic life-saving drugs.⁸¹ The suggestion is that developing countries need a longer transitional period to implement TRIPS.⁸² Some Chinese have even complained that developing countries, particularly China, have already made great scientific and technological breakthroughs (such as China's four great inventions: gunpowder, the compass, typography and paper-making) without receiving patent fees for these inventions.⁸³ There clearly exists strong resistance to the enforcement of IPR in developing countries that have little intellectual property to protect.⁸⁴

Despite the high implementation cost of the TRIPS Agreement, China is determined to progress economically on the back of scientific and technological advancement and thus realizes that it must develop its own patents, copyrights and trademarks to avoid lagging behind developed countries.⁸⁵ In order to achieve this aim, it must adopt all the rules and laws that regulate intellectual property in industrialized countries. Despite this determination, the Chinese government and China's legal system find it extremely difficult to honor TRIPS and to enforce IPR.⁸⁶ To understand this, we must first acknowledge how China's political position influences Chinese business practices.

⁸¹ Ibid.

⁸² Ibid.

⁸³ See supra note 78.

⁸⁴ Ibid.

⁸⁵ Ibid. at 167

⁸⁶ See Chapter 2, Section 3 below.

B. China's Political Position

The international media often imply that China may not remain a communist country for very long⁸⁷ because of its acceptance of the market economy and admission into the WTO.⁸⁸ Unlike these widespread views in the West, however, the Chinese believe that a communist government and a market economy can be compatible.⁸⁹

⁸⁷“The popular press today contains many articles that say that China's objective is to implement a "market economy", but that is actually not very careful. China's objective is the achievement of a "socialist market economy". Because China's National Development and Reform Commission (governmental body responsible for economic planning decisions) gives much more room for market forces to operate in the economy, and makes greater use of market signals to formulate its overall economic planning many people conclude that China has gone capitalist. But there is a very basic difference that is not always readily visible. In China, market forces are a tool that informs the ultimate decision maker, a means to the end of compiling a plan for the economy. In a fully-fledged capitalist economy, market forces are not tools that inform, advise, and guide a decision maker; they are the decision maker. In China, market forces are a means to an end. In a fully-fledged capitalist economy, they are the end (as well as the means). In a fully-fledged capitalist economy, the whole system would be doing without an NDRC. In China, the NDRC is still very much there, and it will not go away any time soon.” Manuel. E. Maisog, “Mergers and acquisition in China: Some Legal and Policy perspectives for business strategists” in *Practices for Mergers and Acquisitions in China leading lawyers on understanding changing laws and trends, navigate the review and approval process, and identifying the key steps in a successful M&A transaction* (Aspatore, Thomson Reuters, 2008) at para. 1 and 2.

⁸⁸Ibid.

⁸⁹For example, a document entitled *Decision of the State Council on Reforming the Investment System*, issued by the State Council in July 2004 in China states:

"The fundamental role of the market in allocating resources shall be fully brought to bear under the macro-level control and regulation of the state, in accordance with the requirements [for] improving the organizational system of the socialist market economy ..."

The intention is to accept a proposition that market forces and state economic planning are not mutually exclusive, but Westerners can have a hard time envisioning how this can be accomplished in practice.

Another portion of the text states:

"The objectives of the deepening of the reform of the investment organizational system are: to reform the government's system for the management of investments made by enterprises, and to put into practice the right of enterprises to determine their own investments in accordance with the principle of 'he who makes the investment, makes the decisions, receives the benefit, and bears the risk' ... [and] finally, to establish, after having gone through the deepening of reform and broadening of liberalization, a new model of investment mechanism in which the market guides investments, enterprises make their own investment decisions independently and banks independently examine loan [proposals], and in which multiple channels and means [literally 'ways'] of financing, a [sufficient] scope of intermediary services, and effective macro-level control and regulation [are all available]."

There seems to be a solid commitment to establishing market forces in China in most of these words, but the last few seems to contradict all the rest. There follows this statement later in the document, which expounds on the last contradictory part, and suggests just how significant it may be, to the extent of possibly being a tail that wags its dog:

"The National Development and Reform Commission, under the leadership of the State Council, and jointly with [other] relevant [state] agencies in accordance with the division of their professional responsibilities, and in close coordination with mutual cooperation and effective operations [while

Indeed, the fact that China is a communist country cannot be ignored when explaining China's relationship with the capitalist West.⁹⁰

Communism is often equated with Marxism, which has always aimed to seize and hold power in the name of working people rather than viewing power as an end in itself.⁹¹ For Marxists, power is a means of creating a new society that, according to Karl Marx, will eventually need no state institutions or any coercive political power.⁹² The Chinese communists that inherited the ideology of a neo-feudal economy from the Sun Yat-sen era aimed to develop a command economy following the Russian example of a planned economy.⁹³ Following the failure of such an artificially structured economic system, the

under] supervision in accordance with law, will control and regulate the investment activities of the entire society, maintain investments within a rational scale, optimize investment structures, raise yields on investments, and promote the continued rapid, coordinated and sound [literally 'healthy'] development of the national economy and the overall progress of society."

The result is an economy in which market forces are at play all the time, and quite visibly and powerfully so, but in which the state simply will not surrender all vestiges of its power to plan the economy. Ibid at para.3 to para. 4.

⁹⁰ Ibid. See also infra note 115.

⁹¹ See Robert C. Tucker, *The Marx-Engels Reader* (New York: Norton Company, 1978).

⁹² Ibid. In the case of China, all Chinese constitutions have been programmatic and the current 1982 Constitution is no exception. A programmatic constitution defines a mission for the state and its citizens. The aim is to turn China into a strong and prosperous, culturally advanced, democratic socialist nation. Laws and legally defined rights are subordinate to these overall goals of social and political development. Therefore, if the law conflicts with a specific party policy, the law and not the policy must be changed.

The power in China is, according to the Constitution, held by the people's democratic dictatorship. The "people" includes all workers, peasants, intellectuals and other patriots supporting socialism and the unity of the motherland. All classes do not have equal status. The state is "led by the working class on the alliance of workers and peasants" according to Article 1 of the Constitution. The leadership of the working class is exercised through its political party, the Chinese Communist Party (CPC). Thus, the domination by the CPC in politics is justified by using basic Marxist-Leninist ideological tenets.

The Constitution is the highest law of the PRC. It is considered the "mother-law" (*mufa*), from which all other laws are derived as if they were its children (*zifa*). The Constitution has theoretical supremacy over other laws, but this supremacy has little real meaning. The Constitution is more of a guideline than a practical source of law. See *P.R.C. Const.* (1982), pmb., art.1, art.2 and art 5; See Jonas Alsen "An Introduction to Chinese Property Law" (1996) *Maryland Journal of International Law and Trade* at para. 8-9. See Wang Chenguang and Zhang Xianchu, *Introduction to Chinese law* (Hong Kong: Sweet & Maxwell Asia, 1997). See also infra note 88 mentioning that the ultimate Chinese goal is for the state to wither away.

⁹³ Both China and Russia were communist countries firmly rooted in a traditional Marxist/Leninist ideology. Susan Tiefenbrun, "Piracy of Intellectual Property in China and the Former Soviet Union and its Effects upon International Trade: A comparison" (1998) *Buffalo Law Review* at para.7.

Chinese, unlike the Russians, did not end in bankruptcy and did not abandon their old ideology for a new one.⁹⁴

Instead, Chinese communists first “reformed” their own ideas and understanding about the economy and then dropped the idea of a command economy altogether, radically changing their communist views on the market economy and the capitalist way of doing business.⁹⁵ They began with the notion of a socialist market economy and gradually considered opening up their country to capitalist corporations.⁹⁶ From there, it was logical - and inevitable - for China to become part of the international free market,

⁹⁴ Since 1979, under the leadership of Deng Xiaoping, the Chinese have gradually and sequentially adopted market reform tactics resulting in a currently booming economy. In contrast, Russia's similar reform movements initiated by Gorbachev during the era of Perestroika and Glasnost produced a revolution in 1991 resulting in the collapse of communism, the establishment of a fragmented Commonwealth of Independent States, and the radical adoption of market reforms and privatization that have resulted in the economic decline and demoralization of the Russian peoples. *Ibid* at para. 7.

⁹⁵ Realizing that a centrally-planned, state-run economy was not leading to economic prosperity, the Deng government began to allow a private ownership in 1978. The Chinese justify private ownership of means of production in a communist society with the "primary stage" theory. Chinese scholars argue that they are in the "primary stage of socialism" (shehuizhuyichujijieduan). According to this theory, the Chinese society had bypassed an essential stage of economic order by going directly from a feudal peasant society to a socialist society. To reach the goal of a real communistic society where the state eventually would wither away, a stage of market economy had to be experienced. This primary stage is expected to last one hundred years from the 1950s. Public ownership plays the dominant role even during this phase of development, but private ownership is also permissible. It is acknowledged that the private sector of the economy involves wage labor and this will lead to unequal income, but this is tolerated since the private sector provides employment and helps meet people's needs. Moreover, Chinese theorists argue that private enterprise in China is meant to be different from private enterprise elsewhere (i.e., capitalist societies) because it developed long after China's socialist transformation. The public sector clearly occupies the dominant position in the economy and the owners of private enterprise are expected to use most of their profits in expanding production instead of using it for personal consumption.

Legal protection for private business was given in a 1988 constitutional amendment article 11 not long after the launch of this theory. Therefore, article 11 of the Constitution was amended in 1988 by adding a third paragraph:

The state permits the private economy to exist and to develop within the limits prescribed by law.

The private economy is a complement to the socialist public economy. The state protects the

lawful rights and interests of the private economy and provides guidance, supervision and control. This

article is the foundation for the private economy (*siyingjingji*) in China. See Alsen *supra* note 113, at para. 21, 28, 36.

⁹⁶ *Ibid*. China's open door policy encouraged foreign investments, which created more jobs, produced gains in outputs and exports at negligible cost to the government, and linked the Chinese economy to the international market. Like Taiwan and Hong Kong, in the 1960s and 1970s China flooded the world market with textiles, garments, shoes, toys, and consumer electronics. China became a global force in these commodities by the 1980s and 1990s which caused an explosion of growth, consumer goods production, personal income, exports, and foreign exchange earnings. See Alsen, *supra* note 95, at para. 8

in which it will play an increasingly important role. After the collapse of the former Soviet Union and the 1989 protests in Tiananmen Square, Chinese communists focused on their promise to build a strong and modern economy and to create a prosperous society. The Chinese thus opened up their market by agreeing to difficult concessions that, although accommodating transnational corporations, would also contribute to making China a modern, industrial and wealthy society.⁹⁷

C. Key Concessions

Western multinational corporations and Western governments, whose interest in China is based on capitalism ideals, are already playing a role in the development of the country.⁹⁸ Foreign multinationals expand their businesses into China in order to increase profits.⁹⁹ Indeed, the West expects the Chinese government to create a free market

⁹⁷ See Long supra note 71.

⁹⁸ Investment from Western industrial countries, especially those from North America and Western Europe, has increased steadily throughout the 1990s. In 1992, the United States was the fourth largest investor in China, accounting for about 4.6% of total FDI inflow. In 2000, the United States became the second largest foreign investing country in China, contributing 10.8% of the total FDI inflow. Similarly, the share of investment from United Kingdom, Germany, France, the Netherlands, and Canada together grew from 2.3% in 1992 to more than 10% in 2000. Industrial countries, as a whole, contribute to more than 30% of all FDI inflow in China in 2000, more than double the figure for 1992. See K.C. Fung, Hitomilizaka, Sarah tong, "Foreign Direct Investment in China: Policy, Trend and Impact" (China's Economy in the 21st Century, conference, Hong Kong, June 24, 2002). In 2004 the number of foreign firms was about one third of China's total number of enterprises. Xialon Fu, "Foreign Direct Investment, Absorptive capacity and Regional Innovation Capabilities: Evidence from China" (OECD, 2007) online: <http://www.oecd.org/dataoecd/44/23/40306798.pdf>. The number of MNE R&D centers in China rose more than tenfold to around 1,100 (representing 920 MNEs) by the end of 2008. See Gert Bruche, "A New Geography of Innovation, China and India Rising" (2009) Columbia FDI perspectives, Online: <http://www.vcc.columbia.edu/content/new-geography-innovation-china-and-india-rising>. According to the department of Ministry and Commerce (MOFCOM), China's main FDI sources are the US, Europe and Japan. MOFCOM reported that China received US \$111.17 billion in FDI in 2008. Wang Ke, "China Needs More FDI: MOFCOM official" (28 June 2009) China org.cn, online: http://www.china.org.cn/business/news/2009-06/28/content_18027692.htm

⁹⁹ "Profitability is the ultimate motive for FDI inflows into China". See Yongding Yu, "FDI in China" (Institute of World Economics and Politics, Chinese Academy of Social Sciences, 2004) online: <http://www.joho-fukuoka.or.jp/kigyos/asif-fko/third/YongdingYu.pdf>. Claiming approximately 20% of the world's population, China provides the biggest potential marketplace for both trade and investment. Raymond. L. Taylor, "Tearing down the Great Wall: China's road to WTO accession" (2001) 41 IDEA:J.L. Tech. 151.

economy and to implement rules and laws that allow its corporations to operate and compete under conditions closely resembling those of Western capitalist societies.¹⁰⁰ The West believes that the ideology of the Chinese government is no obstacle to a fruitful partnership as long as it does not interfere with the capitalist way of doing business.¹⁰¹ The Chinese have changed many tenants of their state ideology to meet Western capitalist demands and to create optimal economic and legal conditions for capitalist corporations to trade.¹⁰² Indeed, they have even changed many aspects of their legal system in order to satisfy the demands of the capitalist West.¹⁰³

The fact that the West and China have managed to forge a partnership despite their ideological differences implies that their relationship is based on powerful interests from both sides. However, this relationship is anything but easy and trusting. The West

¹⁰⁰ “With the deepening of China’s reforms and the opening and the rapid development of its economy, China has progressively expanded the applicable scope of national treatment to foreign investment. Foreign investors and their investment have basically enjoyed national treatment in operational activities with specific preferential treatment in the area of taxation (amounting to super national treatment). The 16th conference of the CPC Central Committee has emphasized that the investment environment should be further improved and national treatment should be granted to foreign investment” Henry Gao and Donald Lewis, eds, *China’s participation in the WTO* (London: Cameron May, 2005) at 154

¹⁰¹ The recent problem concerning Google’s activity in China is a result of the fact that Google’s business is in the field of information. Since information could have political significance, the Chinese government’s action against Google are not against Google’s business but Google’s actions, which, in the opinion of the Chinese communist government, are breaking laws which protect the Chinese political legal system. See Steven Musil, “China’s Media Slams Google as Politicized” *CNET news* (21 March 2010), online: http://news.cnet.com/8301-1023_3-20000847-93.html

¹⁰² Since the end of the 1970s, law has been held indispensable to China’s modernization, so that “the drive to strengthen the legal system has led to developments in almost every aspect of the law.” Tao-tai Hsia & Wendy L Zeldin, “Recent Legal Developments in the PRC” (1987) 28 *Harv. Int’l L. J.* 249, at 256. By the end of 1995, in addition to numerous laws and regulations relevant to market economy issued by local governments, about 100 laws for market economy had been enacted by PRC’s National People’s Congress and its Standing Committee. Huang, “Continued Improvement in Chinese Legislation” (1996) 39 *Beijing Rev.* 22, at 22-24; See also Shu Jie Peng & Si Yi Ni, “China’s Laws Gradually Dovetailed with the International Norms” *People’s Daily (overseas ed.)* (13 Dec.1995) at 4. The desire to do large-scale business with foreigners has forced China to create a legal system that is not arbitrary or based on state policy but governed by the rule of law. William H. Overholt, *The Rise Of China: How Economic Reform is Creating A New Superpower* (New York: Norton Paperback,1994).

¹⁰³ *Ibid.*

needs China and it is careful not to offend the Chinese unnecessarily.¹⁰⁴ However, it does not approve of Chinese ideology and political practices.¹⁰⁵

That said, the Chinese government has profoundly changed its economic views,¹⁰⁶ realizing that politicians are not qualified to control and run the economy.¹⁰⁷ Having recognized this important fact, politicians have relinquished their ambition to interfere in the economy and accepted for themselves the much more passive role of monitoring, aiding and serving its interests and those of businesses regardless of their origin and

¹⁰⁴ Strategic and economic issues explain why the U.S. government has become largely muted over human rights in China. For example, even though the Clinton administration remained critical of China's human rights record, it refrained from using pressure tactics to push for human rights in China. As Human Rights Watch Asia complained, Clinton's decision to delink human rights and Most Favored Nation Status removed the "last vestige of meaningful pressure on China from the international community" since "other governments and key trading partners with China had long since given priority to expanding economic ties." Ming Wan, *Human Rights in Chinese Foreign Relations: Defining and Defending national Interests* (Philadelphia: University of Pennsylvania Press, 2001) at 46 and 65.

¹⁰⁵ Ibid.

¹⁰⁶ "During 1957 to 1978, there existed only SOE's and collectively owned enterprises in China....During 1979 to 1993, companies with a modern concept became demanding in China. The state recognized the need for establishing modern companies in order to implement the economic reform in China. One of the major tasks was and still is for the State to release the heavy burden of poorly managed SOE's. It was believed that companies were one of the best business forms to realize the goal of reducing government intervention, and of separating investors from direct management". Gu Minkang, *Understanding Chinese Company Law* (Hong Kong: Hong Kong University Press, 2006) at 7 and 8.

¹⁰⁷ Ibid. Consider the following statement by the CPC chief, who stated that "[w]e must change the way in which state-owned enterprises operate, especially large and medium-sized ones, and push them into the market to increase their vitality and efficiency." See J. Lee Haibo Li, "Party Congress Introduces Market Economy" (1992) 35 Beijing Rev. 9, at 9 (discussing 14th National Congress of the CPC). It was widely accepted that the best way to revitalize the state-owned enterprises was to force them into the market. It also has been asserted that the history of China's reforms shows that all that could be completed within the limits of the state ownership have already been done. It was even openly and officially announced that the Chinese government's stand against privatization "represents a practical rather than ideological issue due to the fact that a low-income country like China has no access to abundant private capital. Privatization would not necessarily help to perfect the country's market economic system." "This statement may be deemed a harbinger of a creative advance of Marxism, which meets the needs of the times." Furthermore, when economically successful, privatization of the state-owned enterprises was approved by the PRC government or the CCP. In Zhucheng, a modest city in Shandong Province, two-thirds of the state-owned enterprises were at loss before 1992. Through reform, mainly by selling the government holdings in the enterprises to their employees or other companies, all of the reformed 272 enterprises make profits now. Rongji Zhu, a top leader of the PRC, visited this city in 1996 and "strongly affirmed our way of doing things," said Vice Mayor Chen. Later, Zemin Jiang, the President of the PRC, invited leaders of the company in this city to share their experiences at a conference. "Who cares whether an enterprise is state-owned?" said an official in Zhucheng City. "What is important is whether it earns money, pays taxes and is good for workers." See Liwei Wang, "The current and Legal Problems behind China's Patent Law" (1998) Temple International and Comparative Law Journal at para. 16 to 18.

ownership, which is arguably *the* most important concession that the Chinese government has made.¹⁰⁸ As a result, Chinese businesses, including both private and state-owned firms, operate more or less in a free market environment, primarily serving their own interests and obeying market forces rather than government instructions.¹⁰⁹

This change in approach by the Chinese government has created a new economic reality in China, which has had a far-reaching effect on legal issues and, in turn, affected the behavior of Chinese businesses and the capacity and power of the Chinese government to implement and enforce WTO or Chinese legislation. However, no party can expect Chinese corporations to abide by and honor laws that could put them out of business and make them victims of “creative destruction,” which is how the market economy treats weak and unsuccessful firms.

When China joined the globalization process, its status was no different from that of any other developing country.¹¹⁰ In other words, in comparison with developed countries, China has significantly lower productivity and technological sophistication.¹¹¹

¹⁰⁸Ibid. and supra note 92 and 98.

¹⁰⁹Ibid.

¹¹⁰In terms of per capita GDP China is still one of the poor developing countries in the world. See United Nations Statistics Division, online: <http://unstats.un.org/unsd/demographic/products/socind/inc-eco.htm>

¹¹¹In international comparison with OECD countries, R&D intensity in China is still low and the bulk of it is still devoted to development. The gap is even larger if comparing high tech industries, where the contrast with the U.S. and Japan is quite remarkable. For example for 2005 R&D intensity in Japan was 95.7% in computers and office equipment while it was only 3.2 % in China, R&D intensity in Electronics and Communications was 5.6% in China while it was 26.9% in the U.S., and the high tech average is 4.6% in China, while it is 29% in The U.S. and 25.7% in Japan.

Moreover, even though, after the United States, China was the largest importer and exporter of products from high-tech industries in 2005, and ahead of Germany and Japan, the dominance of FDI firms and the large share of processing trade of imported materials often raise the questions whether China’s high-tech industries are really high-tech and whether the high-tech industries in China are really Chinese. The data reveals that Joint ventures and foreign-owned firms are the most important contributors to high-tech trade, in terms of both exports and imports. In the year 2005, the share of wholly foreign-owned firms’ high-tech exports was 71.9%, while the import share reached 65.7%.

Also, while it is true that China had the second highest number of researchers in the world, just behind the United States, and ahead of Japan and the Russian Federation, the reason that China is able to compete with OECD countries in absolute numbers is its large population. A much smaller percentage of the Chinese population has a tertiary degree compared with OECD countries but in absolute numbers this still translates

By making economic and legal concessions, China found itself in a complex and often difficult position, again like any other developing country that had been pressured into making concessions to developed economies.¹¹² In this respect, the protection of intellectual property and transfer of modern technology and know-how from one partner to another is an important yet controversial issue that affects not only the successful expansion of the global market but also the co-operation between the West and China.

In conclusion, the strategies and payoffs of Western players in this global game of international trade have only briefly been identified and encapsulated. Only when the position of the West is sufficiently understood can we begin examining China's response and growing sphere of influence. This chapter introduced the major global players involved and the interests that drive their economic goals in order to contextualize the role played by IPR in later chapters. This role includes advancing the respective interests of the West and China as well as comprehending and anticipating significant developments in their treatment and protection of intellectual property against the backdrop of their growing co-operation. In Chapter 2, the legal aspects of this problem are discussed.

into a large pool of skilled people. In terms of doctoral university enrollment, they are still considerably below the levels in the United States and the EU. See OECD, "Measuring China's Innovation system National Specificities and International Comparisons" (2009) STI Working Paper 2009:1 Statistical Analysis of Science, Technology and Industry 46 -64.

¹¹² "China is still a developing country confronted with huge sustained pressure of unemployment, a fragile agricultural basis, a low development of service industries, reform of state-owned enterprises at a critical juncture and outstanding problem of unbalanced regional development. Under such circumstances, the headway made by China in implementing its WTO commitments was hard won, See Henry Gao, *supra* note 104, in foreword.

Chapter 2: The History of Intellectual Property and its Current Predicament

INTRODUCTION

The first section of this chapter briefly reviews the history of IPR. The historical analysis describes the significant relationship between the enforcement of IPR and the commercial interests of businesses. Section 2 provides an overview of the TRIPS Agreement, especially its effectiveness in balancing the competing interests of developed and developing economies. We observe that although the agreement aims to improve the bargaining positions of weaker parties, it does so at a pace that might be considered to be too rapid for some developing countries. Section 3 examines China's response to TRIPS and assesses how this regulation affects the country's legislation and legal system. Even though China's domestic legislation mostly complies with international obligations, there continues to be a major conflict between China and the US over the former's enforcement of these laws, as discussed further in Section 4. The fact that the major problem is the enforcement of IPR supports the fact that the legislation and treaty obligations expected of the parties have moved beyond China's capabilities.

1. THE HISTORY AND NATURE OF INTELLECTUAL PROPERTY LAW

Intellectual property can refer to creative intellectual products,¹ knowledge that has a useful application² or the names or labels of business enterprises.³ However, none of these definitions encompasses intellectual property completely. Intellectual property becomes so only when it is protected by law. In other words, intellectual property is primarily a legal concept. Most intellectual creations, practical and scientific knowledge and skills as well as names and labels belong to traditional cultures or are generally available in the public domain. Thus, intellectual property can be defined as the part of culture that is owned by those who created or invented it and who have property rights over it.⁴

Although the legal concept of intellectual property is relatively new, the history of human invention and creativity - and its subsequent protection - is as long as the history of humankind.⁵ Nevertheless, for the majority of human history, whatever people created

¹Article 2(1) of the Berne Convention refers to the subject matter of copyright as “literary and artistic works”. See Berne Convention for the Protection Literary and Artistic Works, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221.

² Article 27(1) of the Agreement on Trade Related Aspects of Intellectual Property (TRIPS) describes the subject matter of patents as “any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application”. See Agreement on Trade Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments- Results of the Uruguay Round, 33I.L.M.1197 (1994) [hereinafter TRIPS].

³ For instance Article 15(1) of the TRIPS in reference to the subject matter of trademarks states: “Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colors as well as any combination of such signs, shall be eligible for registration as trademarks. See Ibid.

⁴See Kembrew McLeod, *Owning Culture: Authorship, Ownership, and Intellectual Property Law*, Vol. 1 (New York: P. Lang, 2001). See also R.J Coombe, “Critical Cultural Legal Studies” (1990) 10 Yale Journal of Law & the Humanities 463. Also consider the economist Max Wirth’s objection to the ownership of patents: “Inventions do not belong in the category of intellectual property, because inventions are emanations of the current state of civilization and, thus, common property. . . inventions are merely blossoms on the tree of civilization.” See R. E. Meiners, “Patents, copyrights, and trademarks: property or monopoly?”(1990) 13 Harv.J.L & Pub.Pol’y at 916.

⁵ Chris May suggests that people have since before recorded history protected certain types of knowledge (i.e.: of magical practices) through secrecy, which was passed down from generation to generation

or invented became part of their cultures and belonged to their societies.⁶ However, traditionally we have been more interested in protecting ownership over material goods produced by knowledge and skills than we have protecting knowledge itself.⁷

Only recently have humans begun to “invent” knowledge with the explicit purpose of creating intellectual property in order to derive income.⁸ In prehistoric times, the development of new knowledge and technological advancement affected the very survival of humankind, not only because such knowledge was scarce and/or slow to progress but also because it determined who would survive and who would perish. In ancient times, which were characterized by relatively rapid technological progress, the names of inventors were rarely considered to be important enough to be remembered or recorded.⁹ Certainly, interest in the invention was far greater than was interest in the inventor. Only in classical Greek and Roman eras were the creators of new ideas and works of art recognized and honored for their contributions to human knowledge and culture.¹⁰ Talented and creative people enjoyed recognition and respect, and were

according to tribal custom. See Christopher May and Susan K. Sell, *Intellectual Property Rights: A Critical History* (Boulder, Colo.: Lynne Rienner Publishers, 2006) at 43.

⁶ “A tour of the great civilizations of the pre-modern world -- Chinese, Islamic, Jewish, and Christian -- reveals a striking absence of any notion of human ownership of ideas or their expressions”. See Carla Hesse, “The rise of intellectual property, 700 B.C.--A.D. 2000: an idea in the balance”(2002) 131:2 *Daedalus* 26 at 27.

⁷See generally Boudewijn Bouckaert, “What is property”(1990) 13 *Harvard Journal of Law & Public Policy* 775.

⁸ The concept of intellectual property -- the idea that an idea can be owned - is a child of the European Enlightenment. It was only when people began to believe that knowledge came from the human mind working upon the senses -- rather than through divine revelation, assisted by the study of ancient texts -- that it became possible to imagine humans as creators, and hence owners, of new ideas rather than as mere transmitters of eternal verities. See Hesse supra note 6 at 26.

⁹ Egyptians for example did not record the names of their inventors or architects.

¹⁰See Edward W. Ploman and Hamilton L. Clark *Copyright: Intellectual Property in the Information Age*, (London: Routledge, 1980) at 5-7

occasionally rewarded materially, but their “reward” was generally respect and fame.¹¹ This was not because Greeks or Romans were prejudiced against property, including intellectual property;¹² it was simply that intellectual creation and new knowledge was of no significant economic value in those times.¹³ However, whatever could be profitable was properly protected by law. For instance, slaves were profitable and consequently they were considered to be valuable legal property.¹⁴

It was not until the Industrial Revolution that the economic value of innovations increased. In the pre-industrial economy, technological progress was rare; however, by the mid-18th century, a constant stream of innovations was beginning to make industrial production and thus national economies dependent on technological inventions.

Innovations became “fashionable,” which invited a sarcastic comment from Doctor Johnson: “All the business of the world is to be done in a new way: men are to be hanged in a new way; Tyburn¹⁵ itself is not safe from the fury of innovation.”¹⁶

As soon as businesspeople realized how profitable new knowledge was, they felt a strong desire to own it.¹⁷ The concept of industrial patents and the legal protection of

¹¹ Patronage was the dominant form of artistic compensation in Rome. See L.D. Reynolds and N. G. Wilson, *Scribes and scholars: a guide to the transmission of Greek and Latin Literature* (Oxford: Clarendon press 1991) at 24.

¹² However, Socrates held the sophists in contempt for charging fees for their learning and Plato held that all ideas exist in every mind, discoverable by reason. See Plato, *The Republic* (New York: Penguin Classics, 2003).

¹³ Vukmir on the other hand argues that there is reason to believe that intellectual property had economic value in Roman times despite the fact that there is no evidence of it in Roman law. However, the fact that it did have value is his premise for proving that it was protected, which supports the notion that intellectual property only gained protection when it was of significant economic value. See generally M. Vukmir, “The roots of Anglo-American Intellectual Property Law in Roman law”(1992) 32 *Idea* 123.

¹⁴ Vukmir makes an interesting side point that perhaps intellectual property might not have been protected in Rome because the source of its production was already owned - the slave. *Ibid* at 128. See also Bouckaert note *supra* 7 at 800.

¹⁵ Place of execution in early England, where martyrs often died for their beliefs.

¹⁶ Phillis Dane, *The First Industrial Revolution* (Cambridge: Oxford press, 1965) at 119.

¹⁷ “If patents can be taken as a gauge of anything, then it is primarily of the increasing awareness of the patents system’s existence and a defensive -or opportunistic-reaction to it by manufacturers.” See

innovations made the ownership of knowledge a reality and, together with other aspects of the Industrial Revolution, introduced a new economic system, namely capitalism.¹⁸ This was an important point in the development of the legal concept of intellectual property law.

By contrast, other forms of intellectual property, such as copyright, were recognized earlier. Even in ancient Rome and Greece, authors of books occasionally contracted with scribal copiers to produce and publish their works.¹⁹ However, copying by hand was a slow process, which meant that production was on a small scale and little profit was made.²⁰ In the Middle Ages, there was a significant increase in the production of books by monks in monasteries, but for the most part they copied religious texts and old books and authorship was rarely an issue.²¹ This trend changed radically when the printing press was invented by Gutenberg in the 15th century.²² Printing books suddenly became a profitable industry and the demand for new books and new authors grew steadily. The Venetians were the first to develop printing and publishing on an industrial scale.²³ New printing businesses mushroomed in Venice and quickly the market flooded,

MacLeod, Christine, *Inventing the Industrial Revolution, the English Patent System, 1660-1800*, (New York: Cambridge University Press, 1988) at 143.

¹⁸ Ibid.

¹⁹ There is no recognition of copyright in Roman law but there is some evidence of “publishing contracts” with booksellers. See Ploman, Edwards W., and L. Clark Hamilton, *supra* note 10 at 7.

²⁰ Booksellers relied on slaves to copy texts, but even then most readers depended on borrowing books from friends and having their own slaves copy them out. see Reynolds and Wilson, *supra* 11 note at 23

²¹ Monks rarely attributed their reproductions to the original authors; instead, whatever they produced was attributed to the word of God. Arnold Hauser, *The Social History of Art* (London: Routledge, 1968) at 327-328.

²² See generally Elizabeth L. Eisenstein, *The Printing Press as an Agent of Change: Communications and Cultural Transformations in Early Modern Europe* (New York: Cambridge University Press, 1979).

²³ Venice is cited as the first city in Italy, and practically the first in Europe in which the business of printing and publishing became important. See George Haven Putnam, *Books and Their Makers During the Middle Ages: a Study of the Conditions of the Production and Distribution of Literature from the Fall of the Roman Empire to the Close of the Seventeenth Century* (New York : Hillary House, 1962) at 404-405.

which led to bankruptcies and problems requiring government intervention.²⁴ The government tried to control who and what could be published by introducing licensing into the printing business²⁵ and later by requiring permission from authors to publish their works.²⁶ However, this initial government intervention was not sufficient to control unauthorized copying²⁷ because its main purpose was to regulate and protect the Venetian economy and the interests of printers.²⁸ Paradoxically, only when publishers and booksellers created a guild in order to police unauthorized printing did the economic interests of authors gain recognition.²⁹ The guild and the authors became allies³⁰ and the relationship that developed between them established the beginning of an author's ownership over his or her work that has been the basis for financial arrangements between the parties ever since.

The first statute protecting the rights of authors, termed the Statute of Anne, was introduced in England in 1709.³¹ The history of the process that preceded it is interesting and significant from the point of view of understanding the interests behind it. The

²⁴ The printing of Latin classics far outstripped the demand and left many printers either bankrupt or at the mercy of their creditors. See Joseph Lowenstein, *The Author's Due: Printing and the Prehistory of Copyright* (Chicago: University of Chicago Press, 2002) at 69.

²⁵ Copyright first appeared as an economic "privilege" (ie:quasi-patent in the form of an exclusive right to operate in a particular industry) for publishers in the form of monopolies over individual titles or classes of works. See Ronald V. Bettig, "Critical Perspectives on the History and Philosophy of Copyright" (1992) 9 *Critical Studies in Mass Communication* at 139.

²⁶ In a desire to bring order into the printer's desperate scramble to secure rights on profitable titles, the council of ten in Venice, in 1544, decreed that the printing of any work would be prohibited unless writer permission of the author was secured. See M.B. Wallerstein, M.E. Mogee, and R.A. Schoen, eds, *Global Dimensions of Intellectual Property Rights in Science and Technology* (Washington D.C. National Academy Press, 1993)

²⁷ "The piracies kept coming". See Lowenstein supra note 24 at 74.

²⁸ Hirsch asserts the protection offered to printers was not a product of "scruples, nor the attitude of the public [to pirated copies] but [that] economic consideration were responsible for privileges". Rudolph Hirsch, *Printing, Selling, and Reading 1450-1550* (Wiesbaden, Germany: Otto Harrassovitz, 1967) at 81.

²⁹ Government intervention failed to prevent counterfeit production which finally resulted in the unification of booksellers into a guild in 1549. See Wallerstein and Mogee supra note 26 at 52.

³⁰ Many scholars claim the opposite, asserting that authors were disadvantaged because of a loss of bargaining power. See for example Bettig supra note 25 at 140.

³¹ See Hauhart, R. C. "The origin and development of the British and American patent and copyright laws." (1985) 5 *Whittier Law Review* at 548.

introduction of this statute stemmed from the monopoly of the publishing guild, which met with the support and approval of the Crown.³² Both publishers and the Crown had a mutual interest in creating and maintaining a monopoly in publishing; the guild had control over the business and the Crown found it a convenient way to exercise censorship and control publishing.³³ However, the arrangement did not work well for either party since those who wanted to avoid censorship resorted to scribal publishing.³⁴ As a result, the guild lost business and the Crown lost control. The Crown's solution was to identify authors and make them responsible for their writing, which greatly simplified their task by leading them directly to the culprits.³⁵ In order to achieve that, no publishing was permitted without the permission of the author.³⁶ That permission naturally "could be obtained at a price," which gave the authors a share in the profit,³⁷ if not in the power and ability to control the publishing industry.³⁸

By the late 17th century, the improvement in printing technology and the drop in the price of books attracted new competitors into the industry, and this further eroded the

³² In 1557, Philip and Mary Tudor granted a charter for the incorporation of the Stationers Company, giving it a firm monopoly over printing and publishing in England for the next 150 years. See Bettig supra note 25 at 139.

³³ The Crown supported the Stationers Company in exchange for the company's policing of its members against the publication of seditious and heretical material as well as its control of pirate operations. Ibid.

³⁴ Given the censorship role of the Stationer's Company, scribal publications flourished on the margins because for many dissenters it was the only way of securing wider circulation of their views. See Harold Love, *Scribal Publication in Seventeenth Century England* (Oxford: Clarendon Press, 1993) at 189.

³⁵ See infra note 55.

³⁶ In the seventeenth century, Parliament forbade the members of the guilds to "print or reprint anything without the name or Consent of the Author". Rather than any recognition of authorial rights, this ban was primarily meant to ensure that libelous or blasphemous literature could be traced, with anonymous works the responsibility of the printer. See May & Sell, supra note 5 at 90.

³⁷ By mid-seventeenth century publishers began paying authors for the right to copy and publish their works. See Bettig supra note 25 at 140.

³⁸ See also generally Mark Rose "The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship" (1988) 23 *Representations* 51; Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968) and Lionel Bentley, *The Making of Modern Intellectual Property Law* (Cambridge, Cambridge University Press, 1999).

monopoly of the book stationer's guild.³⁹ The attempts of the guild to win the support of the Crown failed because the Crown lost interest in supporting the monopoly.⁴⁰ The weakening and disappearing of the monopoly further strengthened the positions of authors because they had a choice of publishers. The statute of Anne finally recognized and defined the legal concept of intellectual property now known as copyright.⁴¹ Apparently, the interests and the rights of authors were recognized and protected, not because of authors, but because of the conflicting business interests of individual publishers and of the desire of the Crown to control the ideas and the content of all forms of publishing.⁴² Once established, the concept of copyright as a legal concept of intellectual property has gradually been accepted across the entire Western world.⁴³

However, during the mid-19th century, the US, which recognized the copyrights of domestic authors, saw no need for a similar recognition of the copyrights of foreigners.⁴⁴ They claimed that it was not because of the commercial interests of American publishers but because of their love of knowledge and their desire to educate the American public. US publishers, in their appeal to Congress in 1842, proclaimed:

“All the riches of English literature are ours. English authorship comes to us as free as the vital air, untaxed, unhindered, even by the necessity of translation, into the country: and the question is, shall we tax it, and thus impose a barrier to the circulation of

³⁹ See Hauhart supra note 31 at 547.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ For a thorough documentation of the chronological progression of intellectual property laws throughout Europe see Stephen P. Ladas, *Patents, trademarks, and related rights: national and international protection*, Cambridge (Mass. : Harvard University Press, 1975).

⁴⁴ Hesse supra note 6 at fn 23.

intellectual and moral light? Shall we build a dam to obstruct the flows of the rivers of knowledge?”⁴⁵

Only by the end of the 19th century was foreign copyright recognized in America. American publishers changed⁴⁶ their minds from their lofty ideals about the free press and the education of the American public to the pragmatic acceptance of the rights of foreign authors to be paid for their work.⁴⁷ Their change of heart came about because of numerous “penny publishers” spreading across the US, taking a large share of the market from large publishing houses. The simplest way to get rid of their competition was to recognize and pay copyright to all domestic and foreign authors, which worked well since penny publishers could not afford to pay royalties.⁴⁸

Another form of intellectual property, trademarks, was first introduced in ancient times by both manufacturers and merchants who used them to establish the identities and origins of their goods.⁴⁹ Trademarks are the most durable form of intellectual property because they can remain valid for as long as a business is active.⁵⁰ For many businesses,

⁴⁵ Ibid. at fn 25.

⁴⁶ However, even after the Chace Act, foreigners had to comply with formalities and books were protected only if manufactured in the US.

⁴⁷ By the opening of the twentieth century, as America came to be a full-fledged competitor in international commerce in intellectual property and a net exporter of intellectual property, American legal doctrine began to move toward an increasing recognition of unique authorial rights rooted in the sanctity of the personality of the creator, rather than simply in commercial privileges extended for utilitarian ends. See Hesse supra note 6 at 43.

⁴⁸ “They now realized that they would be better positioned than the new generation of publishers to sign exclusive copyright agreements with foreign authors that would be enforceable within the United States.... American theologians, including the Reverend Isaac Funk, now denounced the “national sin of literary piracy” (which had allowed him to make his fortune on his pirated Life of Jesus) as a violation of the seventh commandment.” Ibid at 42.

⁴⁹ Ruston claims there were three types of marks throughout history, the first, which he claims existed since the dawn of man, was the family mark which identified the property of a clan or group, second is the adopted trademark, which in times of illiteracy, including Rome, was able to distinguish the origin of the ware, and finally the compulsory mark that carried the authority of the state or the ruler. See Gerald Ruston, “On the origin of trademarks” (1955) 45 The Trade-Mark Reporter at 136.

⁵⁰ Article 18 of the TRIPS Agreement dealing with the terms of protection of a trademark states that “The registration of a trademark shall be renewable indefinitely”. See TRIPS supra note 2.

trademarks are thus their most valuable form of intellectual property.⁵¹ For example, many trademarks existed in ancient Rome, although they were not recognized by the government or protected by law.⁵² In medieval European cities, merchants and trade guilds often managed to impose some sort of monopoly for their products and goods, which were stamped with their labels.⁵³ They also often enjoyed the protection of the city authority and feudal lords for their goods,⁵⁴ though, that protection was more a monopoly for their businesses than mere protection for their labels.⁵⁵

Trademarks and patents began to enjoy full legal protection at the time of the Industrial Revolution.⁵⁶ Consequently, in 19th century England, all three major forms of intellectual property, namely copyright, trademarks and patents, were legally protected, and as the Industrial Revolution spread to other European countries, the laws of intellectual property were accepted - but not without some difficulties and delays.⁵⁷ As time progressed, further development of the concept of intellectual property came to

⁵¹Brands are special intangible assets and for most companies are the most important asset due to the economic impact that brands have. See generally Sean Morris, “The Economics of Distinctiveness: The Road to Monopolization in Trade Mark Law” (2011) 33 Loy. L.A. Int'l & Comp. L. Rev. 321.

⁵²Ibid.at 132 -135.

⁵³See Daniel M. McLure, 1979 “Trademarks and Unfair Competition: A Critical History of Legal Thought” (1979) 69 The Trademark Reporter at 310 -311.

⁵⁴ The guilds (and the right to the use of their mark) were preserved by grants or charters from the sovereign which gave the guild a monopoly in the production and distribution of a product in a defined geographical area. Ibid at 311.

⁵⁵ “The compulsory production mark likewise assisted the guild authorities in preventing those outside the guild from selling their products within the area of the guild monopoly. Thus, a key function of early trademarks was to aid in the enforcement of guild monopolies”. Ibid at 311.

⁵⁶For a historical documentation of the origin of patents from their beginning in Venice to their emergence in France to their treatment in America see generally Frank D. Prager, “A History of Intellectual Property from 1545 to 1787”(1944) 26 Journal of the Patent Office Society 711.

⁵⁷ In tracing the adoption of Intellectual Property laws throughout Europe from the 19th century to the 20th century, May & Sell suggest that adoption followed the interests of each individual nation. “In general innovators tended to seek higher levels of intellectual property protection. Imitators and technological “latecomers” sought maximum access to intellectual property at minimal or no cost.” See May & Sell supra note 5 at 111.

fruition as companies grew and a global interest in protecting business knowledge expanded.

The term intellectual property was introduced in 1855 by an American librarian Lysander Spooner who argued that scientists and inventors should have permanent IPR.⁵⁸ However, the contemporary meaning of the term intellectual property, which refers to all types of ownership over knowledge, copyrights, logos, brand names and patents, was introduced later in the 20th century.⁵⁹ As history shows, the origin of intellectual property was in commercial interests because it sought to protect whatever knowledge and labels were of value to business.⁶⁰ The laws of all industrial countries agreed with these commercial interests and thus they followed suit by introducing similar laws protecting the ownership of knowledge as had been traditionally applied to material ownership.

The most recent agreement that illustrates this amicable relationship between Western businesses and Western governments is TRIPS.⁶¹ The TRIPS Agreement represents a group of 12 multinational corporations⁶² and reflects the views and interests of the US and other developed countries.⁶³ The blossoming interest that industrial nations

⁵⁸Graham Dutfield, *Intellectual Property and the Life Sciences Industries: A Twentieth Century history* (Aldershot, United Kingdom: Dartmouth Publishing, 2004) at 53. See also Justin Hughes, "Notes on the Origin of Intellectual Property: Revised Conclusions of New Sources" (2009) Cardozo Legal Studies Research (exploring the early history of the phrase Intellectual Property).

⁵⁹See May & Sell, *supra* note 5 at 18.

⁶⁰ It is not only IPR-protected products, technologies and services that are major exports of modern business corporations, but also the rights themselves, in the form of licenses to use patented processes, techniques and designs, copyrights, trademarks and franchises. See Michael P. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property* (Washington: Brookings Institution Press, 1998) at pg 194

⁶¹The TRIPS Agreement is the most recent multilateral agreement establishing a global regime for the governance of intellectual property rights. The TRIPS Agreement came into force in 1994 and is a precondition to entry into the World Trade Organization. See TRIPS *supra* note 2.

⁶² See Susan K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (New York: Cambridge University Press, 2003) at 19.

⁶³ TRIPS resulted from a highly successful attempt by the U.S., Europe and Japan, supported by business associations representing transnational corporations, to place IPRs on the agenda of the Uruguay Round of GATT, and then to force through an agreement covering a wide range of IPR standards going far beyond

and their corporations have in intellectual property is at unprecedented levels.⁶⁴ For many modern corporations, although intellectual property is the most valuable of their possessions, it is also often the most difficult to protect.⁶⁵ That difficulty stems from the very nature of intellectual property: unlike material property, when non-owners acquire knowledge, they do not deprive the original owner of that knowledge or the opportunity to use it (although the owner may suffer indirect losses in the marketplace).⁶⁶ However, the development of copying technology makes it easy to use other people's intellectual property without cost or permission. In industrial countries, such unauthorized use of intellectual property, for example copying books, CDs or DVDs, is frequent, but this level of illegal copying is significantly lower than in developing countries.⁶⁷

Since the beginning of globalization, the protection of intellectual property has become a huge source of conflict between Western corporations and developing countries.⁶⁸ Moreover, because resources are scarce in the developing world, emerging

the original aim of preventing counterfeiting of trade marked goods and piracy of copyrighted works. See Bellmann, Dutfield and Melendes-Ortiz, eds, *Development Perspectives on TRIPS, Trade and Sustainability* (London: Earthscan Publications, 2003) at 2. [Hereinafter *Development Perspectives*].

⁶⁴ More and more goods and services produced contain intellectual property which requires investment of considerable resources, both financial and human. It was estimated that, by 1986 more than 27% of U.S. exports contain intellectual property components while the rate was less than 10 % when the GATT was negotiated. See Gadbow, "Intellectual Property and International Trade: Merger or Marriage of Convenience?" in L.T. Brown, E. A. Szweda, eds., *Trade Related Aspect of Intellectual Property* (1990) at 223-222.

⁶⁵ Many companies are based on technology. The advantage they have over their competitors is having a product that their competitors do not have. For small and medium sized companies, if the product cannot be protected, they will lose any advantage they have, and may either stagnate or go bankrupt. George E. Fisk "Intellectual property, how it interacts with a companies bottom line" Murray G. Smith, ed., *Global Rivalry and Intellectual Property: Developing Canadian Strategies* (Canada: The Institute of Research and Public Policy, 1991) at 109. [Hereinafter *Global Rivalry*].

⁶⁶ For an in-depth analysis of the intangible nature of intellectual property see Landes, W.M., Posner, R.A., "The Economic Structure of Intellectual Property Law" (2003) 36 *International Review of Intellectual Property and Competition law* 612.

⁶⁷ Lowest piracy rates are in developed industrial countries. See Business Software Alliance, "Seventh annual BSA and IDC Global Software 2009 Piracy Study" (2009) online <http://portal.bsa.org/globalpiracy2009/studies/globalpiracystudy2009.pdf>

⁶⁸ Counterfeiting and copyright piracy increased in the 1980's because of the desire of developing countries to catch up in the industrialization process and to have access to printed educational material which they

economies tend to attach greater significance to material property.⁶⁹ It is hardly surprising, therefore, that those who lag behind in economic development and technological knowledge are also behind in their understanding of IPR.⁷⁰

Likewise, there is also a relationship between the severity of the problem of the protection of intellectual property and the degree to which multinational corporations invest into developing societies. Since the most intense economic activity by foreign corporations now takes place in China,⁷¹ the conflict between corporations and their governments over IPR has become most serious with the Chinese government and Chinese businesses.⁷²

needed in that context. In response, the US pushed for the introduction, in the GATT forum, for an item dealing with the problem of counterfeiting products, and, later of copyright piracy. The situation was accelerated by the following factors: the advent of copy-prone electronic based technologies and products; the growing competitiveness of newly industrialized developing countries in the manufacturing sector; the increasing globalization of the market place; and the growing perception of intellectual property by the enterprises of the developed countries as a strategic asset. Thus there was tension between the quest for tighter protection of IPRs being pursued by the industrialized owners of the property, and the maximization of social welfare arising from an unimpeded diffusion of IP being pursued by the developing countries through more relaxed protection of IP. See Adranico O. Adede, "Origins and History of the TRIPS Negotiations" (2003) in *Development Perspectives* supra note 69 at 25.

⁶⁹ When intellectual property rights are introduced into an economy to primarily serve foreign interests, such laws are not well understood and for the most part remain irrelevant to the countries' social needs. This is why some developing countries respond very negatively to intellectual property. Unless sufficient local interests are enhanced by the intellectual property system, it will continue to be seen as irrelevant to social need in developing economies. See Bankole Sodipo, *Piracy and counterfeiting: GATT TRIPS and Developing Countries* (U.K., London: Kluwer Law International, 1997) at 9-10.

⁷⁰ Ibid. This lack of knowledge put developing countries in a considerably disadvantageous position in negotiating the TRIPS: "The representatives of developing nations were often trade negotiators with little or no prior exposure to IP law and few even had advanced legal training. This dissymmetry put them at a disadvantage when discussing detailed and arcane drafting points, especially those linked to the specific history of existing treaties such as the Berne and Paris Conventions. See Daniel J. Gervais, "Intellectual Property, Trade and Development: The State of Play" (2005) 74:2 *Fordham L. Rev* 505 at 507. [Hereinafter Gervais, "State of Play"]. The cost-benefit balance of implementing TRIPS will vary widely from one country to another, but in many cases the costs will be extremely burdensome. According to the World Bank if TRIPS were fully implemented, rent transfers to major technology creating countries particularly the United States, Germany, and France in the form of pharmaceutical patents, computer chip designs, and other intellectual property, would amount to more than \$20 billion dollars. See World Bank, *Global Economic Prospects and the Developing Countries 2002* (World Bank, 2001).

⁷¹ China has been the world's largest FDI recipient among developing countries since early 1990s and remains the leading destination for FDI. With inflows of \$72 billion, the country ranked among the world's top three recipients in 2005. See UNCTAD, *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development* (Geneva: UNCTAD, 2009).

⁷² See Section 4 below chronicling Chinese infringement of foreign IP.

2. THE TRIPS AGREEMENT

The TRIPS Agreement, more than any other international arrangement, lends credibility to the notion that globalization is essentially the “Americanization” of the world economy.⁷³ It is a typically Western contribution to spreading the rules and laws that are essential for the successful and orderly expansion of the capitalist system.⁷⁴ By introducing rules and laws from highly developed countries into the world trading system it forces developing countries that are members of the WTO to adopt and implement IPR - often against their best interests.⁷⁵

The TRIPS Agreement originates from a long history of the legal concept of intellectual property and its significance to the economic activities of industrial countries.⁷⁶ The negotiations that led to its agreement were essentially a “diplomatic” activity that aimed to “convince” all participants in the negotiating process that Western

⁷³“The TRIPS Agreement operates to define and extend capitalist social relations of production on a global scale.” Donald G. Richards, *Intellectual Property Rights and Global Capitalism: the Political Economy of the TRIPS Agreement* (Armonk, N.Y.: M.E. Sharpe, 2004) at 1-10.

⁷⁴ See Richards Ibid. There was a general feeling among developing countries that the concern with IPR protection was being expressed by the US government on behalf of its industries, and that all such efforts towards the establishment of an effective international IPR regime were aimed at furthering the interests of Western businesses and not those of developing countries. This feeling was not without foundation, because the private sector, in which the pharmaceutical industry played a major role, had led the effort to treat IPRs as a trade related matter. See Adede, supra note 69 at 24.

⁷⁵ During the TRIPS negotiations, by and large, the so-called "North" imposed its then most-advanced set of norms on the "South." In fact, major industrialized countries made relatively few concessions, despite their disagreements on some issues, except the need to submit themselves to binding dispute settlement. By contrast, developing countries were forced to accept a package that they perhaps did not fully understand and yet contained a complete set of IP norms they now had to implement into their national law. The only true measures they obtained (in addition to Articles 7 and 8) were transitional periods to implement the Agreement. For most developing countries, transitional periods expired in January 2000. In many cases, developing countries did this because of significant political concessions in other sectors of the Round, such as tariffs on tropical fruit or textiles. At the time, there were very few people arguing that TRIPS was good in the short term for all developing countries. Those countries accepted it as part of a package. The IP component of that package, namely the TRIPS Agreement, adjusted the level of IP protection to what was the highest common denominator among major industrialized countries as of 1991. See Gervais, “State of Play” supra note 71 at 509.

⁷⁶ The rules contained in TRIPS evolved mostly in the West over two centuries. See Daniel J. Gervais, "Of Clusters and Assumptions: Innovation as Part of a Full TRIPS Implementation"(2009) 77.5 *Fordham Law Review* 2353 at 2353.

laws and rules that protect IPR serve the best long-term interests of developing *and* developed countries.⁷⁷

Developing countries that have little intellectual property of their own were, in the process of negotiations, less interested in Western ideas of IPR than they were in the transfer of technology, which they see as the most important building block towards the development of the world economy.⁷⁸ An example of a developing country perspective on the negotiations is the Indian position at a meeting of the TRIPS negotiation group on July 1989, which made three important points.⁷⁹

First, India argued that it was only the restrictive and anti-competitive practices of the owners of IPR that could be considered to be trade-related because they alone distorted or impeded international trade. Merely placing the label “trade-related” on them could not bring such issues within the ambit of international trade.⁸⁰

Second, discussions should unambiguously be governed by the socio-economic, developmental, technological and public interests and needs of developing countries. Any principle or standard relating to IPR should be carefully tested against these needs, and it

⁷⁷ See Gervais, “State of Play” supra note 76.

⁷⁸ Developing nations view scientific and technological advancement as the vehicle for industrialization and economic development. In their view, the improvement of international standards and the strengthened national protection of IPRs would increase the cost of modern technologies because of the inherent monopoly feature of IPRs and the possible abusive practices of patent holders. They argued that strengthening legal protection of IPRs, regardless of specific needs and social priorities of each country, could sharply reduce the developing countries’ industrial and technological competitiveness and would give rise to stronger dependencies on the more powerful economies. See Jakkrit Kuanpot, “The Political Economy of the TRIPS Agreement: Lessons from Asian Countries” in *Development Perspectives* supra note 64 at 49-50. Developing countries argued that patents were an obstacle to technological transfer, which they need for development and for enhancement of their capacity to undertake research leading to patentable inventions of their own. See Adede supra note 69 at 30.

⁷⁹ Communication from India, Standards and Principles Concerning the Availability, Scope and Use of Trade -Related Intellectual Property Rights, MTN. GNG/NG11/W/37, 10 July 1980.

⁸⁰ Ibid.

is inappropriate to focus merely on the protection of the monopoly rights of the owners of intellectual property.⁸¹

Third, any discussion on the intellectual property system should keep in perspective that the essence of the system was its monopolistic and restrictive character. This had special implication for developing countries, because more than 99% of the world's stock of patents was owned by the nationals of industrialized countries. Thus, the group should focus on the restrictive and anti-competitive practices of the owners of IPR and evolve standards and principles for their elimination so that international trade is not distorted or impeded by such practices.⁸² India's position, as described above, serves to illustrate the interests and views of developing countries expressed during the negotiations and to show that they cannot but reflect on their approach and treatment of the TRIPS Agreement.⁸³

Furthermore, the TRIPS Agreement acknowledges the views and interests of developing countries in two places. In the preamble, it states that "...[L]east-developed country members [must have] maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base."⁸⁴ Later, in Article 66, the agreement suggests that "in view of the special needs and requirements of least-developed country members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base, member[s] shall not be required to apply the provision of this Agreement, other than Articles 3, 4 and 5, for a period of 10 years from the date of application as defined

⁸¹ Ibid.

⁸² Ibid.

⁸³ UNCTAD, *Resource Book on Trips and Development: An Authoritative and Practical Guide to the TRIPS Agreement* (Cambridge University Press, 2004) at 6 [hereinafter UNCTAD].

⁸⁴ See Preamble of TRIPS supra note 2.

under paragraph 1 of Article 65”⁸⁵ and that “developed country member[s] shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country members in order to enable them to create a sound and viable technological base.”⁸⁶

In both cases, TRIPS addresses the interests of developing countries in general terms and principles.⁸⁷ Although such political statements reflect the goodwill and good intentions of the authors of the TRIPS Agreement, since it is a legal document with the purpose of protecting IPR in the process of international trade, it deals with specific forms of IPR that come from countries that have long been the main sources of new knowledge and new technologies.⁸⁸ No wonder, therefore, that developed countries have played a major role in creating and promoting the TRIPS Agreement.⁸⁹ The preamble also states clearly that IPR are private rights, which means that intellectual property generally belongs to private owners.⁹⁰

The implication is that the TRIPS Agreement aims to protect private interests because, by definition, IPR are private rights.⁹¹ However, if this were its only purpose, the protection of IPR would conflict with the main goal of the WTO, which is to promote trade and economic development.⁹² That conflict would defeat the purpose of not only the

⁸⁵ See Article 66 (1) of TRIPS *ibid*.

⁸⁶ See Article 66 (2) of TRIPS *ibid*.

⁸⁷ See Gervais, “State of Play” *supra* note 71 at 509.

⁸⁸ See Gervais, “Of Clusters and Assumption”, *supra* note 77.

⁸⁹ The improvement of intellectual property protection in developing countries is essential to defend what Abbot called “First World Assets.” See Frederick Abbot, “Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework” (1989) 22 *Vanderbilt Journal of Transnational Law* 689 at 699-207.

⁹⁰ See also Preamble of TRIPS *supra* note 2.

⁹¹ *Ibid*. See UNCTAD *supra* note 84 at 11

⁹² Given the interest of industrialized countries, it is not difficult to understand that efforts to increase the protection of IPRs has long and often been vigorously criticized as being biased and contrary to the idea and goals of freer trade flows. See Thomas Cotter, *Trade and Intellectual Property Protection in WTO Law: Collected Essays* (London: Cameron May, 2005) at 62. See also Paulo Roberto de Almeida, “The “New”

WTO but also of TRIPS itself. This implies that the international protection of intellectual property be kept at an optimal level.⁹³ It must not be overprotected for fear of overshadowing broader and more important interests,⁹⁴ but it must not be under protected either because, in the modern economy, knowledge and IPR play an important role in the success of almost all businesses.⁹⁵ As confirmed by the preamble of TRIPS, the agreement aims “to reduce distortions and impediments to international trade, ... to promote [the] effective and adequate protection of IPR and to ensure that measures and procedures to enforce IPR do not themselves become barriers to legitimate trade.”⁹⁶

The TRIPS Agreement clearly recognizes that the sound development of capitalist economies depends on the ability to balance short-term and long-term interests. Even though it is necessary for corporations and IPR holders to focus on the protection of their

Intellectual Property Regime and its Economic Impact on Developing Countries”, in G. Sacerdoti, ed, *Liberalization of Services and Intellectual Property in the Uruguay Round* (1990). See Abdulqawi Ahmed Yusuf, “Developing Countries and Trade-Related Aspects of Intellectual Property Rights” in UNCTAD, *Uruguay Round: Papers on Selected Issues 185*, UNCTAD/ITP 10 (1989).

⁹³ UNCTAD supra note 84 at 10. The most serious conflicts and uncertainties between the developing and developed world do not relate to protection as such but rather to the scope and duration of exclusive intellectual property rights. Optimal duration in the overall context of promoting welfare is controversial and established durations appear sometimes somewhat arbitrary. Moreover, exclusive rights may result in protectionist market allocation, and import monopolies may not bring about adequate transfer of technology and know-how to developing countries. Scope and duration are, in other words, profoundly linked to competition policy. As much as in constitutional law, there is a long term need to establish checks and balances on the use of powers allocated and granted by law in intellectual property as much as in other legal fields. See Cotter supra note 92 at 67.

⁹⁴ Low levels of protection of foreign intellectual property have been considered to be beneficial to developing economies since they allow them to make use of technology and know how without “draining their reserve of hard currency, while advancing their own drive for import substitution” See Jerome H. Reichman, “Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection” (1989) 22 *Vanderbilt Journal of Transnational Law* 747, at 761 It has been argued that Strong IPRs can prevent the development of the global economy by allowing right holders to control markets, establish import monopolies and limit competition, thereby, interfering with trade liberalization. From the point of view of development, it is often submitted that the historically relatively late introduction of patent protection or copyright protection supports free access to resources and invention in order to develop an economy. See Cotter supra note 93 at 63.

⁹⁵ There is no doubt that a prime purpose of linking trade and intellectual property serves the goals of improving market access for an increasing number of products containing intellectual property and for defending the technological edge which more and more provides the basis of economic leverage and leadership in the world economy. See Cotter *ibid.* at 61-62.

⁹⁶ See preamble of TRIPS supra note 2.

immediate interests for fear of losing their competitive advantages, in order to generate long-run returns, they cannot possibly forget their long-term interests.⁹⁷ When it comes to IPR, their awareness of these long-term interests moderates their requirements for short-term IPR protection. The incorporation of this long term strategy into present business practices will have a beneficial impact on the economies of developing nations as it's execution rests on their full industrialization and successful emulation of first world societies.

Indeed, the TRIPS Agreement is about legislating to ensure that the *minimum protection* of IPR is enforced and it explicitly allows members to introduce “more extensive protection than is required by the agreement.”⁹⁸ UNCTAD has further argued that “TRIPS established minimum standards of IPR protection that are consistent with the prevailing standards in the most highly industrialized countries. Highly industrialized countries such as the US and Japan went through prolonged periods of providing weak IPR protection to achieve their present levels of development. TRIPS to some extent precludes today’s developing countries from relying on this same model of economic transformation by setting minimum standards at a level tailored for later stages of growth. Moreover, by setting minimum standards, but not maximum standards, TRIPS leaves an opening for bilateral and regional agreements that may significantly shift the balance of economic interests to the more powerful WTO member, thereby further exacerbating

⁹⁷ The future prosperity of developing countries is as much in the long term interests of developed countries as it is in the interest of developing countries. It is in the hands of private economic operators to demonstrate in their business operations that an enhanced framework of intellectual property rights and its incentives for market access, investment, transfer of technology and know-how, is used in an overall manner beneficial to foster social and economic development, including job creation, under newly adopted market economies in the developing world. See Cotter supra note 93 at 67.

⁹⁸ Ibid.

problems in the global distribution of wealth.”⁹⁹ Article 7 of the TRIPS Agreement further confirms that “the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”¹⁰⁰

Section 1 of part 2 of the TRIPS Agreement deals with copyright and related rights. For example, the first paragraph of article 9 establishes the relation of the TRIPS Agreement to the Berne Convention,¹⁰¹ while the second paragraph of this article clarifies the nature of copyright protection, which applies to “the expression of ideas not the ideas themselves.”¹⁰² Furthermore, the agreement extends copyright protection beyond “literary and artistic works” to include “utilitarian works such as computer programs, databases, and architectural works.”¹⁰³ Copyright is a creative activity in which developing countries have a better chance of competing with the developed world because many forms of creative expression come from talent and do not require considerable capital.¹⁰⁴

The first article of section 2, article 15, defines the term trademark. For the majority of business corporations, trademarks are an important intellectual property.¹⁰⁵ A trademark represents the value a company offers to the consumer in the marketplace and,

⁹⁹ See UNCTAD supra note 84 at 35-36.

¹⁰⁰ See TRIPS supra note 2.

¹⁰¹ See Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* (Sweet and Maxwell Limited London, 2003) [Hereinafter *Gervais, Drafting History*] at 124.

¹⁰² *Ibid.*

¹⁰³ See UNCTAD supra note 84 at 136.

¹⁰⁴ *Ibid.* at 137.

¹⁰⁵ See Morris, supra note 51. Proper protection of well-known trademarks is a significant issue in international trade relations, as a trademark is often a company’s most valuable asset. See Wang Yan Fsnng, “The Protection of the Well-Known Trademark, Judicial Protection of Intellectual Property Rights in China” (2001) online at, <http://www.chinaiprlaw.com/english/forum/forum21.htm>

in the globalization process, what the company has to offer the world at large.¹⁰⁶ The more successful the business enterprise the more valuable and important its trademarks are. Since most well-established and successful business enterprises come from developed countries, the protection of trademarks is especially important to them¹⁰⁷ because it affects their profits.¹⁰⁸ In general, when a business offers its products to consumers as an unbranded item, it sells at a much lower price than would a similar branded product.

The lack of protection of their trademarks can make it difficult or even impossible for successful multinationals to successfully trade in the global marketplace.¹⁰⁹ Product imitation is a serious nuisance to any corporation; however, since copies are usually of

¹⁰⁶For example, the trademarked brand names IBM, Coca-Cola, and Marlboro are estimated to be worth around \$150 billion as intellectual property assets and are considered famous trademarks as they are universally recognized and well-known. See Fung, *Ibid.* Analysts say the word Nike alone is worth \$7 billion. See James Gleick, "Get Out of My Namespace" *N.Y. Times Magazine* (21 Mar. 2004) at 44.

¹⁰⁷The need for international intellectual property protection becomes evident after learning how much money the United States loses every year because of a lack of adequate protection, usually in the realm of billions of dollars a year. Alisa Cahan, "China's Protection of Famous and Well-known Marks: The Impact of China's Latest Trademark Law Reform on Infringement and Remedies" (2004) *Cardozo Journal of International and Comparative Law* 219, at 219. Many of America's most well known businesses obtain two-thirds or more of their sales from overseas markets including Coca-Cola®, Colgate-Palmolive®, Dow Chemical®, Exxon®, McDonald's®, and Xerox®. See Murray Weidenbaum, "All the World's A Stage: Business Has a Starring Role in the Increasingly Global Economy, and the United States is the Lead Actor Despite its Weaknesses" (1999) *Mgmt. Rev.* 42 at 47.

¹⁰⁸ *Ibid.*

¹⁰⁹The effect that counterfeit products have on consumer protection results in a loss of goodwill for companies. At the very least, consumers who buy counterfeit goods of inferior quality, thinking that they are made by a well-known company, will blame that company when the inferior quality of the goods comes to light. When a company loses its goodwill and reputation, consumers will begin buying products from other companies. The combination of these two factors--loss of sales and goodwill--inevitably leads to loss of profits. A substantial loss of profits for America's biggest companies would not bode well for the U.S. economy, considering the jobs and national revenue that would be lost. Ashley C. Adams "Section 211 of the Omnibus Appropriations Act: The Threat to International Protection of U.S. Trademarks" (2002) *North Carolina Journal of International Law and Commercial Regulations* 221. For example, The U.S. Customs Service estimated in 1993 that 750,000 American jobs were lost because of counterfeiting. Toby Roth, "Fight Modern-Day Global Pirates" *J. of Com.* (24 Oct. 1996) at 7A. With respect to revenue, it was estimated in 1994 that New York City alone lost \$350 million in tax revenue to counterfeiting. Lawrence Van Gelder, "6 Are Accused of Violating Trademark Laws," *N.Y. Times* (18 July 1996) at B5. The importance of global markets to the U.S. economy is undoubtedly the main reason the United States has been so aggressive in pushing for international intellectual property protection. See Sodipo *supra* note 70 at 81.

inferior quality, the harm never seriously interferes with the firm's day-to-day running if they are not falsely claimed to be authentic. However, if the copy is infringing the companies' trademark, then the harm can damage the name, reputation and profit of the corporation.¹¹⁰

Section 3 of part 2 of the TRIPS Agreement relates to the protection of geographical indication, which for some enterprises is as important as the protection of trademarks, for example geographical indications for wines and spirits.¹¹¹ Section 5 of part 2 covers all aspects of patents as intellectual property. "TRIPS defines the scope of a patent"¹¹² and deals "in detail with the following patent issues: subject matter and patentability requirement; non-discrimination; ordre public and morality; therapeutic, surgical and diagnostic methods; biotechnological inventions: genetic resources, plant variety protection, traditional knowledge; rights and exceptions; disclosure of information; non-voluntary uses; and, process patents; burden of proof."¹¹³

The patent provisions in the TRIPS Agreement do not help developing countries speed up their technological and economic levels of development. New technologies and new knowledge, which are usually a product of R&D in developed countries and which are thus protected by patent provisions, are generally beyond the reach of businesses in developing countries. The provision to extend the term of protection to 20 years from the date of application makes things even more difficult. "The extending period of patent

¹¹⁰ Ibid. In some cases counterfeit brake shoes and other important components in cars and airplanes have caused accidents and deaths. For example counterfeit brake lining and shoes for Ferod caused monthly sales of about 250,000 to fall to 1,500. See Sodipo supra note 70 at 122 fn 5.

¹¹¹ See Kal Raustiala & Stephen R. Munzer, "The Global Struggle over Geographical Indications" (2007) *Eur. J. Int'l L.* 337.

¹¹² See Gervais, *Drafting History* supra note 102 at 220.

¹¹³ See UNCTAD supra note 83 at 252-253.

protection and the strengthened exclusive rights will limit the scope for early legitimate imitation by local firms.”¹¹⁴

The protection of pharmaceutical patents results in high prices for pharmaceutical products, and extended protection prevents local firms from manufacturing cheaper versions. Maskus states: “The preponderance of conclusions is pessimistic about the net effects of drug patents on the economic welfare of developing countries (or, more accurately, of net importers of patented drugs).”¹¹⁵ Maskus continues: “It is remarkable how little is known about the potential effects of changing global policy regimes in this fundamental manner, despite the fact that the pharmaceutical sector is the most extensively studied of all IP-sector industries.”¹¹⁶ It could be argued that “although arguments can be made that the introduction of patents can be beneficial in stimulating innovation and attracting inward investment, there is little or no empirical evidence to confirm that this is likely to apply in the case of developing and least-developed countries.”¹¹⁷

Finally, part 3 of the TRIPS Agreement describes the enforcement of IPR including minimum standards and the acquisition and maintenance of such rights.¹¹⁸

This review of the articles in the TRIPS Agreement aimed to provide a general overview of its scope and nature. TRIPS came into being in response to the need to create safe and orderly conditions without which the unfettered growth of business activity would be impossible.¹¹⁹ It acknowledges the fact that the modern economy relies at least

¹¹⁴Ibid. at 364.

¹¹⁵ Keith Maskus, *Intellectual Property Rights in the Global Economy* (IIE, 2000) at 160.

¹¹⁶Ibid. at 160.

¹¹⁷See UNCTAD Supra note 84 at 264.

¹¹⁸Ibid. at 575.

¹¹⁹ See Gervais, *Drafting History* supra note 102 at 202.

as much on knowledge as it does on capital.¹²⁰ Although it creates a business environment that generally favors business enterprises from developed countries, it does not prevent developing countries from acquiring knowledge and achieving the transfer of technology as long as they operate within the framework of TRIPS and cooperate with Western corporations. The fact that developing countries seem to be forced to accept the TRIPS Agreement does not change the fact that it is a necessary bridge to cross in order to become equal partners. The next section explores how the TRIPS Agreement affects the Chinese legal system in more detail.

¹²⁰ Ibid.

3. CHINESE INTELLECTUAL PROPERTY LEGISLATION

Professor Francois Curchod, in the foreword to *Chinese Intellectual Property Law in the 21st Century*, stated that “the Chinese intellectual property system ... started from scratch (with the exception of the trademark law) two decades ago.”¹²¹ However, Chinese intellectual property law is actually as old as the Chinese effort to develop a market economy. This fact makes Chinese intellectual property law a valid part of the process of transforming the country into a modern society that is willing to take whatever actions are necessary to join the international economic system and to become an equal and active participant in world affairs.

Mary L. Riley writes in *Protecting Intellectual Property Rights in China*, which was published in 1997 before China acceded to the WTO and signed the TRIPS Agreement, that “intellectual property law in China has become more settled ... and the process of change has become more predictable.”¹²² Furthermore, she argues that in China “obedience is a result of threats, not laws. It is probably true that Chinese people must be taught to take laws seriously before they will obey them.”¹²³ In her description of the Chinese attitude towards the law, she continues:

“China has chosen the Mandarin model: a model where laws are laid down to govern foreigners and tradesmen at the bottom of society, and those laws are wielded by a privileged class not necessarily subject to the laws. Laws are to be used as tools of power, a modern replacement for the gun, at least in day-to-day activities. Thus law is a tool of order in the hands of the Communist Party and its

¹²¹Xue Hong, Zheng Chengsi, *Chinese Intellectual Property Law In the 21st Century* (Sweet & Maxwell Asia, Hong Kong, Singapore, 2002) at xxxiii.

¹²² Mary L. Riley, *Protecting Intellectual Property Rights in China* (Hong Kong, Sweet and Maxwell, 1997) at 1.

¹²³ *Ibid.*

elder statesmen. Not only is law not the only tool, it is a dispensable tool if it fails to do what the statesmen want of it, therefore it is not a particularly trusted tool.¹²⁴

If we add that the Chinese understand that their chief task is to replace the rule of man by the rule of law,¹²⁵ then it is fair to expect Chinese intellectual property law to reflect the laws and rules created in the West, as prescribed in international legal documents such as the TRIPS Agreement, rather than the realities of Chinese political, social and economic life. This is essentially what the authors of *Chinese Intellectual Property Law in the 21st Century* proclaim: “In general, China’s entry to the WTO significantly influenced the speed and scope of the development of the Chinese IP system.”¹²⁶ In other words, Chinese intellectual property law reflects not what China is now, but what China aspires to become. As with any other developing country, the Chinese signature on the pages of the TRIPS Agreement is witness to what they are determined to become one day - a developed country ruled by law. With that in mind, I now review Chinese intellectual property law.

In the introduction to *The Copyright Law*,¹²⁷ it is asserted that Chinese law is consistent with:

1. The TRIPS Agreement, which China joined in 2001;
2. The Berne Convention for the Protection of Literary and Artistic Works (the 1971 Paris Version), which China joined in 1992;
3. The Universal Copyright Convention, which China joined in 1992; and

¹²⁴ Ibid.

¹²⁵ Long Yongtu, “Negotiating Entry: Key Lessons Learned” in Carlos A. Magarinos and Francisco C. Sercovich, *The WTO: The Birth of a New Catching-Up Strategy* (New York: United Nations Industrial Development Organization, 2002) at 31.

¹²⁶ See Xue Hong, *supra* note 122 at xxxix.

¹²⁷ *The Copyright Law of the People’s Republic of China*, translated in Xue Hong, *supra* note 122.

4. The Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, which China joined in 1993.¹²⁸

The Copyright Law has 60 articles that are consistent with the TRIPS Agreement but which deal with many more details. Interestingly, article 1 states that the purpose of the law is to “encourag[e] the creation and dissemination of works which would contribute to the construction of socialist, spiritual and material civilization and of promoting the development and prosperity of socialist culture and science.”¹²⁹ While adopting the principles of capitalist law, the Chinese believe they can make it serve the prosperity of socialist culture and science.

*The Trademark Law*¹³⁰ was in 1993 modified and amended to comply with “a view to protecting the interests of consumers, producers and operators and to promoting the development of the socialist market economy.”¹³¹ Its 64 articles contain nothing that contradicts the TRIPS Agreement. Most articles are worded carefully in order to simplify and clarify the interpretation and enforcement of the law. For instance, article 52 on the use of trademarks states:

Any of the following acts shall be an infringement of the exclusive right to use a registered trademark:

- (1) to use a trademark that is identical with or similar to a registered trademark in respect of the identical or similar goods without the authorization of the trademark registrant;

¹²⁸ See Xue Hong supra note 122 at 5.

¹²⁹ See *The Copyright Law*, Article 1 supra note 122.

¹³⁰ *The Trademark Law of The People's Republic of China*, translated in Xue Hong, supra note 122.

¹³¹ Ibid.

- (2) to sell goods that he knows bear a counterfeited registered trademark
- (3) to counterfeit or to make, without authorization, representations of a registered trademark of another person, or to sell such representation of a registered trademark as were counterfeited or made without authorization;
- (4) To replace, without the consent of the trademark registrant, the registered trademark and market against the goods bearing the replaced trademark; or
- (5) To cause, in other respects, prejudice to the exclusive right of another person to use a registered trademark¹³²

This article is particularly important in China because of the number of foreign corporations that carry out business in the country and which depend on Chinese authorities to protect their trademarks against the numerous privately owned businesses that, in their struggles to survive in the socialist market economy, are more interested in profits than in abiding by IPR.

*The Patent Law of the People's Republic of China*¹³³ reflects the international treaties on patents to which China has acceded:

1. The TRIPS Agreement;
2. The Paris Convention for the Protection of Industrial Property (the 1967 Stockholm Version), which China joined in 1985;

¹³²*The Trademark Law*, Article 52, *ibid*.

¹³³*The Patent Law of the People's Republic of China*, translated in Xue Hong, *supra* note 122.

3. The Patent Cooperation Treaty, which China joined in 1994;
4. The Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposed Patent Procedure, which China joined in 1995;
5. The Locarno Agreement Establishing an International Classification for Industrial Design, which China joined in 1996; and
6. The Patent Law Treaty, which was signed as the final act of the Diplomatic Conference on the Adoption of Patent Treaty Law in June 2000.¹³⁴

*The Patent Law of the People's Republic of China*¹³⁵ and the *Regulations of the Implementation of the Patent Law*¹³⁶ comprise as many pages as the rest of Chinese intellectual property law put together, clarifying the major changes Chinese patent law has undergone in order to comply with the TRIPS Agreement.¹³⁷ For example, article 5, which covers illegal inventions and creations, has been made consistent with article 27, paragraph 2 of the TRIPS Agreement. Article 25 deals with business methods,¹³⁸ while article 11 eliminates “loopholes in Chinese Patent Protection” and is consistent with the TRIPS Agreement in its treatment of “the right of offering for sale.”¹³⁹

Although Chinese patent law, as well as the entirety of Chinese intellectual property law, has been modified in order to assure its consistency with the TRIPS Agreement, it is not designed to only serve China's economic relationships with foreign

¹³⁴ See Xue Hong, *supra* note 122 at 164-165.

¹³⁵ *Supra* note 134.

¹³⁶ *Regulations for Implementation of the People's Republic of China*, (July 1 2001), translated in Xue Hong, *supra* note 122.

¹³⁷ *Ibid.* at 164-165.

¹³⁸ *Ibid.* at 170.

¹³⁹ *Ibid.*

states and protect the IPR of foreigners. On the contrary, Chinese law has been adjusted to the conditions and interests of modern Chinese society and the Chinese economy, even if at times it may sound more concerned with what China wants to become than with what it is at present. For instance, article 4 of the patent law states that “where an invention-creation for which a patent is applied relates to the security or other vital interests of the State and is required to be kept secret, the application shall be treated in accordance with the relevant prescriptions of the State.”¹⁴⁰

The patent rights of state-owned entities are a good example of how willing the Chinese are to comply with the TRIPS Agreement:

“Before the second revision of the Patent Law, state-owned entities (including enterprises and other institutions) could only be patent holders, rather than patent owners. The stipulation was based on ideological considerations: literally, only the state could own such patents. As patent holders, state-owned entities could only enjoy limited rights for their patents. Under the former Patent Law, a state-owned entity could not assign the right to apply for a patent or the patent right unless it received approval from the relevant authority at its higher level. The patent of a state-owned entity could be exploited by other entities according to the state economic plan. Since state-owned entities became independent entities after China changed from a planned economy to a market economy in the 1990s, there is now no reason to restrict the patent rights enjoyed by state-owned entities.

Thus, the outdated restrictions have been removed from the MPL, under which state-owned entities enjoy complete patent rights just like other patent owners.”¹⁴¹

¹⁴⁰*The Patent Law*, Article 4, *supra* note 134.

¹⁴¹*Ibid* at 176.

*The Regulations for the Implementation of the People's Republic of China*¹⁴²

consists of 122 articles devoted to all legal aspects of the implementation of the patent law. The *Rules of Transition on Implementing the Revised Patent Law* and *The Implementing Regulations* contain all the rules that must be observed during the transition period. Meanwhile, in the stipulations on the *Application of the Law Regarding Trials of Patent Infringement Cases*,¹⁴³ article 1 spells out what kinds of cases the court will accept. This article is important from the point of view of the implementation and enforcement of the patent law and accepts the following cases of patent disputes, among others:

1. Disputes over the ownership of the right to apply for a patent;
2. Disputes over the ownership of patent rights;
3. Disputes over contracts for the assignment of patent rights or the right to apply for a patent;
4. Disputes arising from patent infringement;
5. Disputes arising from counterfeiting other persons' patents;
6. Disputes over the exploitation fee after the publication of the applications for patents for inventions and before the grant of patent rights;
7. Disputes over the reward and remuneration for the inventors or creators of service inventions;
8. Cases of pre-litigation requests for stopping infringement or for property preservation; and

¹⁴²*Regulations for Implementation of the People's Republic of China*¹⁴², (July 1 2001), translated in Xue Hong, supra note 122.

¹⁴³*Application of the Law Regarding Trials of Patent Infringement Cases*, translated in Xue Hong, supra note 122.

9. Disputes over the qualifications of inventors or creators.¹⁴⁴

The rest of Chinese intellectual property law covers the layout and designs of integrated circuit protection regulations, regulations on the protection of new varieties of plants and regulations on computer software protection, which are all consistent with the TRIPS Agreement. However, although Chinese intellectual property law tends to comply with TRIPS, some aspects remain inconsistent. For example, under Chinese copyright law, a computer program is still not protected as a “literary work.” Furthermore, 1) only goods, not services, are mentioned in the protection of well-known marks, (2) registration is required for well-known marks and (3) no protection is provided for the geographical indication of wines and spirits. Further, the Chinese Anti-Unfair Competition Law requires “practicability” for a trade secret to be protected, while no such requirement exists in TRIPS. Finally, China does not protect data on the marketing of pharmaceutical or agricultural chemical products that use new chemical entities, as required by TRIPS.¹⁴⁵

Nevertheless, the Chinese authorities have closed all major loopholes in order to make their intellectual property law as consistent as possible with their international obligations while also reflecting Chinese economic and social interests by promoting creativity and innovation and by protecting the interests and rights of the creators of intellectual property.¹⁴⁶ However, as Peter K. Yu repeatedly emphasizes, Chinese

¹⁴⁴ *Application of the Law Regarding Trials of Patent Infringement Cases*, Article 1, translated in Xue Hong, *supra* note 122.

¹⁴⁵ *Ibid.* Peter K. Yu, “From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China. *American University Law Review*” (2006) MSU Legal Studies Research Paper No. 03-15. Online at SSRN: <http://ssrn.com/abstract=578585> at 112.

¹⁴⁶ *Ibid.*

intellectual property laws reflect as much Chinese domestic interests as they do the TRIPS Agreement.¹⁴⁷

The next sections address the problem of the implementation and enforcement of intellectual property law in China, keeping in mind that this is a Chinese problem. Consequently, this work will avoid language that is common in the Western media, such as inflammatory remarks that accuse China of breaking intellectual property law by “stealing” Western technology.¹⁴⁸ Although Chinese citizens and businesses still have a tendency to ignore the law or interpret it in their idiosyncratic ways, their deeds are not tolerated by the Chinese government regardless of its (in)efficiency at enforcing the articles.¹⁴⁹ This work then goes on to explain the causes and the nature of the behavior of Chinese businesses in relation to intellectual property law, particularly their lack of respect for the IPR of multinational corporations that operate on Chinese territory.

4. HISTORY OF CHINESE INTELLECTUAL PROPERTY INFRINGEMENT

The US-China Bilateral Trade Agreement signed in 1979¹⁵⁰ was the first step towards Western intellectual property protection in China. This agreement provided that “each party shall seek, under its laws and with due regard to international practice, to ensure to legal or natural persons of the other Party protection of patents and trademarks equivalent to the patent and trademark protection correspondingly accorded by the other Party.”¹⁵¹ It also provided that “each Party shall take appropriate measures, under its laws

¹⁴⁷ Ibid. at 107.

¹⁴⁸ See Section 4 below chronicling Chinese infringement of foreign IP. ¹⁴⁹ See Chapter 3.

¹⁵⁰ *Agreement on Trade Relations Between the United States of America and the People's Republic of China*, 7 July 1979, 197, U.S. -P.R.C., 31 U.S.T. 4652.

¹⁵¹ Ibid. Art. VI (3), 31 U.S.T. at 4658.

and regulations and with due regard to international practice, to ensure to legal or natural persons of the other Party protection of copyrights equivalent to the copyright protection correspondingly accorded by the other Party.”¹⁵² Such demands surprised the Chinese government,¹⁵³ who had no intellectual property laws to speak of, but nevertheless agreed to the terms.¹⁵⁴ Pursuant to this agreement, China became a member of the World Intellectual Property Organization in 1980 and the Paris Convention for the Protection of Industrial Property in 1984.¹⁵⁵ It also promulgated the Trademark Law in 1982 and a new Patent Statute in 1984.¹⁵⁶ However, the bilateral trade agreement with the US had little influence on Chinese business behavior and the new laws afforded limited protection to foreign authors and inventors.

From that point on, the so-called Chinese piracy issue has been repeatedly raised by Western businesses and the US government.¹⁵⁷ In 1988, the US amended its Trade Act¹⁵⁸ to enable the US Trade Representative (USTR) to identify foreign countries that provide inadequate intellectual property protection or deny US intellectual property

¹⁵² Ibid. Art. VI (5).

¹⁵³ See Hong Xue, “Between the Hammer and the Block: China’s Intellectual Property Rights in the Network Age” (2005) 2 University of Ottawa Law and Technology Journal 294.

¹⁵⁴ From 1950 to 1966, the Chinese government had initiated some measures related to IPR protection, including the trademark registration system. However, these measures were to a large extent scattered, incomplete and very limited. With the beginning of the Great Culture Revolution in 1966, all these initiatives were killed in their infancy. See Zheng Chengsi, *Intellectual Property Law* (Beijing: China Law Press, 1997) at 169-173.

¹⁵⁵ Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, *as last revised at the Stockholm Revision Conference*, July 14, 1967, 21 U.S.T. 1538, 828 U.N.T.S. 305.

¹⁵⁶ See Peter K. Yu, “From Pirates to Partners: Protecting Intellectual Property in China in the TwentyFirst Century” (2000) 50 American University Law Review at 4.

¹⁵⁷ At a 1985 meeting to the U.S. China Joint Committee on Commerce and Trade (JCCT), the U.S. for the first time expressed concerns about weak Chinese IPR standards. In 1987, the U.S. put IPR protection on the agenda for U.S. -China market access talks.” Warren H. Maruyama, “U.S.-China IPR Negotiations: Trade, Intellectual Property, and the Rule of Law in a Global Economy”, in Mark A. Cohen et al. eds., *Chinese Intellectual Property Law & Practice* (1999).

¹⁵⁸ *Trade Promotion Authority Act*, 19 U.S.C. § 2411-2420 (1994).

goods fair or equitable market access.¹⁵⁹ If these issues remain unresolved for six months,¹⁶⁰ the USTR can suspend or withdraw trade benefits, impose duties or other restrictions, or enter into binding agreements that require the offending nation to eliminate or phase out its offending practices, or to compensate the US.¹⁶¹ Since then, the US government has continually used the act to pressure the Chinese and other governments to abide by its intellectual property laws.

In 1989, under pressure from US business executives,¹⁶² the USTR resorted to these provisions of the Trade Act for the first time and placed China on the priority watch list. In response, China passed its Copyright Law in 1990,¹⁶³ while a separate set of computer software regulations followed in 1991.¹⁶⁴ However, the US saw no real change in the enforcement of IPR laws and continued to demand better protection. Indeed, according to one author, “the American government threatened to impose tariffs of \$1.5 billion on Chinese textiles, shoes, electronic instruments and pharmaceuticals... [However,] the Chinese government was angered and retaliated with countersanctions of a similar amount on American commodities such as aircraft, cotton, corn, steel and chemicals.”¹⁶⁵ The Chinese government strongly denounced the USTR’s actions and argued that:

¹⁵⁹ Judith Hippler Bello & Alan F. Holmer, “The Heart of the 1988 Trade Act: A Legislative History of the Amendments to Section 301”, in Jagdish Bhagwati & Hugh T. Patrick eds., *Aggressive Unilateralism: America’s 301 Trade Policy and World Trading System* (1990) at 49, 52.

¹⁶⁰ § 2414(a)(3)(A). Supra note 161.

¹⁶¹ § 2411(c)(1). Supra note 161.

¹⁶² See Daniel Southerland, “U.S. Businesses Urge Trade Sanctions to Stop Piracy of Software in China” *Wash. Post*, (11 April 1989) at E7.

¹⁶³ See Yu, supra note 159 at 9.

¹⁶⁴ *Ibid.* at 9.

¹⁶⁵ *Ibid.* at 7.

- a) China was gradually transitioning into a market economy and thus that it was impossible to immediately upgrade IPR protection to the level of developed countries;
- b) The US should not indiscriminately apply its own IPR standards to a developing country such as China; and
- c) Pharmaceutical and chemical products were daily necessities, and developed countries were obliged to share the relevant scientific and technological fruits with developing countries.¹⁶⁶

In response, the USTR announced that a sanction list was being drafted for charging 100% tariffs to 106 categories of goods imported from China.¹⁶⁷ Under such pressure, and a desire to avoid a trade war, China concluded the Memorandum of Understanding between China and the US on the Protection of Intellectual Property.¹⁶⁸ Pursuant to this agreement, China ratified and acceded to major international intellectual property treaties accompanied by the proper implementing legislation and upgraded its copyright, trademark and patent laws.¹⁶⁹

At the time, it seemed that this 1992 Memorandum of Understanding would lead to an effective intellectual property regime in China. However, it was not enough to protect US intellectual property interests and by 1994, American businesses began to

¹⁶⁶ See Hong Xue, *supra* note 156 at 297.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Memorandum of Understanding between China and the United States on the protection of Intellectual Property*, (1995) 34I.L.M 677

¹⁶⁹ Pursuant to this Memorandum of Understanding, China amended the 1984 Patent Law in 1992, promulgated new patent regulations, and acceded to the Patent Cooperation Treaty in 1993. In addition, China acceded to the Berne Convention for the Protection of Literary and Artistic Works and ratified the Geneva Convention for Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms. To comply with these newly adopted multilateral treaties, the Chinese government amended the relevant domestic legislation, including the 1990 copyright law. See *Ibid.*

complain again about the lack of intellectual property protection in China and the significant losses they were incurring.¹⁷⁰

The USTR identified China as a foreign priority country for the second time in June 1994, and initiated a Special 301 investigation at the prompting of US multinationals. The 1995 National Trade Estimate Report calculated that “US industries . . . lost almost \$850 million in losses to copyright theft alone.”¹⁷¹ The entertainment and business sectors were greatly concerned because China exported its counterfeit products to other countries.¹⁷² According to the US, the enforcement of intellectual property laws in China was “sporadic at best and virtually non-existent for copyrighted works.”¹⁷³

According to Gao Luling, the Chinese government was furious with such criticism and it declared that the Special 301 investigations were “rude and unfair” and that the USTR’s demands were a “flagrant intervention” into China’s internal affairs.¹⁷⁴

A series of threats between the two nations followed. The USTR responded with a punitive tariff plan worth \$180 million, the largest in US history.¹⁷⁵ The US also threatened 100% tariffs on over \$1 billion worth of Chinese imports, ranging from plastic picture frames to cellular telephones. China, “in order to protect its sovereignty and national dignity,”¹⁷⁶ retaliated with a counterthreat of 100% tariffs on US-made CDs,

¹⁷⁰ See Yu, *supra* note 159 at 9.

¹⁷¹ See Office USTR, “1995 National Trade Estimate Report on Foreign Trade Barriers: People’s Republic of China” (Washington 1995) at 54.

¹⁷² See Patrick H. Hu, “Mickey Mouse in China: Legal and Cultural Implications in Protecting U.S. Copyrights” (1996) 14 B.U. INT’L L.J. 81, 93 (1996) (“Exportation of . . . counterfeits has particularly worried U.S. companies because the piracy also deprived them of markets outside China”).

¹⁷³ See Yu, *supra* note 159.

¹⁷⁴ Gao Lulin, “Taking a Stand: China’s Enforcement of Intellectual Property Laws” (1994) *The China Business Review* at 9.

¹⁷⁵ *Ibid.*

¹⁷⁶ See Yu, *supra* note 159 at 9.

cigarettes, alcoholic beverages and other products.¹⁷⁷ The eventual result was that the Chinese resubmitted to the US government's demands in the Agreement Regarding Intellectual Property Rights¹⁷⁸ and agreed to "reform domestic enforcement mechanism[s] by organizing domestic taskforces which were required to investigate and raid factories suspected of making counterfeit products."¹⁷⁹ Part of that agreement also stipulated that the relevant authorities would conduct training and education on IPR protection across the country.¹⁸⁰ This notion of training seemed to create more resentment than did anything else, with the "Chinese angrily interpreting such actions as intellectual imperialism."¹⁸¹

Only a year later, the US designated China a foreign priority country for the third time for its failure to protect IPR and again threatened to impose sanctions worth \$2 billion on Chinese textiles, garments, consumer electronics, sporting goods and bicycles.¹⁸² Again, sanctions and countersanctions of a similar type flew back and forth between the two countries. However, Hong Xue noted that the Chinese government was significantly more cooperative than it had been in the previous two Sino-American negotiation rounds.¹⁸³ She argued that "the Chinese government had learnt from their past experience that neither the contention about developed countries' obligation nor the protest against intervention to internal affairs could ever shield China from the trade

¹⁷⁷ "It also threatened to suspend negotiation with American auto makers over the establishment of joint ventures in China, something which was of considerable priority to American business." *ibid.* at 8. ¹⁷⁸ *P.R.C. - U.S.*, 26 February 1995, 34 *I.L.M.* 881.

¹⁷⁹ *Ibid.* See Yu, *supra* note 159 at 9.

¹⁸⁰ *Ibid.* at 11.

¹⁸¹ See Hong Xue, *supra* note 156 at 299.

¹⁸² See Yu, *supra* note 159 at 9.

¹⁸³ See Hong Xue, *supra* note 156 at 298.

sanction.”¹⁸⁴ The 1996 accord that resulted from the third round of negotiations saw China promise to reaffirm its previous obligations to protect and enforce IPR.

When China acceded to the WTO in 2001, the West expected that as a member country, it would be obliged to comply with the TRIPS Agreement. However, although Chinese intellectual property laws have changed substantially following this accession, the list of complaints about its non-compliance with international standards for the protection of intellectual property continues.¹⁸⁵

According to a 2005 article in *The Economist*, “China continues to be a haven for counterfeiters and pirates”¹⁸⁶ and “international trade associations report that that counterfeiting and piracy rates in China remain among the highest in the world....”¹⁸⁷

Among the countries listed by the European Commission as the most problematic and most regularly subjected to regular monitoring for the protection of IPR, China is the most prominent. The EU’s trade commissioner has stated that, “China is the place that is most worrying perhaps, because that’s where we have the broadest spectrum of problems. 20% of branded products in China are fake.”¹⁸⁸ He went on to say that “the EU has called on Chinese authorities to make it easier to prosecute product pirates. But the Chinese authorities say that because of the country’s sheer size it is difficult to police copyright laws.”¹⁸⁹

¹⁸⁴ Ibid.

¹⁸⁵ See Donald P. Harris, “The Honeymoon Is Over: The U.S.-China WTO Intellectual Property Complaint” (2008) 32 *Fordham Int’l L.J.* 96, 97 (arguing that despite adopting and implementing strong substantive IP laws, China has failed to enforce these laws)

¹⁸⁶ Frank Jones, “Piracy and China” *The Economist* (15 Feb., 2005) A27;

¹⁸⁷ See Seth Faison, “China Turns Blind Eye to Pirated Disks” *N.Y. Times* (28 Mar., 2005) D1. See Greg Mastel, “Piracy in China: No Mickey Mouse Issue” *Wash. Post* (15 Feb. 2005) A27.

¹⁸⁸ Interview of Pascal Lamy, the European Union’s Trade Commissioner, (15 December 2005) *BBC*.

¹⁸⁹ Ibid.

The Commission claimed that between 1998 and 2002, the number of counterfeit or pirated goods intercepted at the EU's external borders increased by more than 800%.¹⁹⁰ It estimates the global trade in pirated wares is worth more than 200 billion euros a year, or about 5% of total world trade.¹⁹¹ “Europe is particularly vulnerable because much of its comparative advantage in world trade rests on producing high quality, branded products. However, it's not just luxury goods, clothing, music and software companies that are complaining either, counterfeiting extended to goods as diverse as spare parts from airplanes and cars, to pharmaceuticals.”¹⁹² Further, an article in the *Hindustan Times* suggested that 46% of pirated goods sold in the US come from China; that in China itself, fake outnumber genuine products by two to one; and that branded medicines illegally copied in China are sold in over 50 countries.¹⁹³

Indeed, reports of this kind are numerous. “Procter & Gamble estimates that it is losing somewhere in the vicinity of \$150 million a year in the local market.”¹⁹⁴ “Similarly the officials of the manufacturer of Wrigley chewing gum, which has a 70 percent share of the Chinese market reported that the Chinese were violating the company's copyrights by selling pirated gum in the city of Guangzhou and had even gone so far as to copy the designs of the Wrigley distribution trucks and were now driving the

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Ibid. Over the years, counterfeiters have become more sophisticated as they have discovered, for example, that large profits can be made from counterfeited medicines like antimalarial and antibiotic drugs. Likewise, counterfeit car parts are manufactured in China to replace genuine parts and are used in both authentic and imitation cars; this yields higher monetary returns than simpler items like counterfeit DVDs. See Xuan-Thao Nguyen, “The China We Hardly Know: Revealing The New China’s Intellectual Property Regime”(2011) 55 St. Louis U. L.J. 773.

¹⁹³ Ibid.

¹⁹⁴ See Gregory S. Feder, “Enforcement of Intellectual Property Rights in China: You Can Lead a Horse to Water, But You Can’t Make It Drink” (2005) 37 VA. J. INT’L L. at 250-51.

same routes.”¹⁹⁵

In 2005, the OECD expressed concerns about the enforcement of IPR protection in China stressing that the “enforcement problem in China had become a greater concern than the IPR legislation to foreign and Chinese stakeholders ... [and] that the effect of criminal and administrative enforcement was insufficient to deter the level of IPR infringement activities in China.”¹⁹⁶

Worse still for Western corporations, “the demand for famous brands and the lack of strong legal protection for brands has made counterfeiting a lucrative and relatively safe commercial activity in China.”¹⁹⁷ During a 2004 US Congressional Hearing, William Primosch stated that the Chinese government might actually be colluding in counterfeiting. He claimed that US companies were:

... concerned about the reports that local government authorities in China are actually promoting the expansion of local industry dedicated principally to counterfeiting. At a minimum, local authorities are knowledgeable of counterfeit production and taking no action to halt it. There appears to be no mechanism for the national government to prevent local governments from aiding and abetting counterfeiting by local industry. In addition, a member has reported that the Chinese customs service has not cooperated in blocking exports of counterfeit products even when solid evidence of counterfeiting was provided. It is claimed that, since the “exporting” of counterfeit products does not constitute a “sale” of the products, the relevant Chinese law did not apply.¹⁹⁸

¹⁹⁵Ibid. at 250.

¹⁹⁶ OECD, “China dialogues on Intellectual Property Rights Policy and Enforcement” (9 February 2005), online: http://www.oecd.org/document/57/0,3343,en_2649_34797_34954361_1_1_1_1,00.html.

¹⁹⁷Ibid.

¹⁹⁸ 2004 U.S. Congressional Hearing, “Statement of William Primosch, Director, International Business Policy, The National Association of Manufacturers on Behalf of the National Association of Manufacturers Before the U.S.-China Economic and Security Review Commission on China and the WTO: Compliance and Monitoring” (Washington: 5 February 2004), online:

In 2009, the USTR reported that “the US remains gravely concerned . . . that China has not resolved critical deficiencies in IPR protection and enforcement and, as a result, infringements remain at epidemic levels.”¹⁹⁹ China's expansive patent docket illustrates her underdeveloped IP system: over 4000 new patent infringement cases were filed annually in China in 2007 and 2008.²⁰⁰

Not only are counterfeit products widely available in China; they are made for export worldwide and are estimated to be valued at approximately \$60 billion a year.²⁰¹ Counterfeited goods from China have appeared in Africa, Southeast Asia, the EU, Canada, and the US.²⁰²

China's failure to prevent copyright and trademark infringement and the violations of other IPR has prompted the US, after many failed negotiations, to file a WTO complaint. The WTO Dispute Settlement Body (DSB) issued the corresponding

http://www.uscc.gov/hearings/2004hearings/written_testimonies/04_02_05wrts/williamprimoschwrttest.htm

¹⁹⁹ Office of the USTR, “Out of Cycle Review Results of 2005”(Washington: 2005), Online: <http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Special_301/asset_upload_file835_7647.pdf>. See Office of the USTR, 2009 Special 301 Report (2009), available at <http://www.ustr.gov/sites/default/files/Fullersion%20of%CC20the%CC202009%CC20SPECIAL%CC20301%%20REPORT.pdf> (declaring that China's intellectual property rights ("IPR") enforcement regime remains ineffective); Kimberly N. Van Voorhis & Christie Yang, “Recent Developments in Patent Law Worldwide” (2010) 997 P.L.I. Patents, Copyrights, Trademarks, & Literary Property Course Handbook Series, 405, 408 (stating that the USTR's Priority List has China as having one of the least developed regimes).

²⁰⁰ Rachel T. Wu, “Awaking the Sleeping Dragon: Evolving Chinese Patent Law and Its Implications for Pharmaceutical Patents” (2011) 34 Fordham Int'l L.J. 549 at 550. Tony Chen & Mark Cohen, “Real and Present Danger: Patent Litigation in China” *Law 360* (10 June 2009), online: <http://www.law360.com/articles/105112> (“Over 4,000 new patent infringement cases were filed with Chinese courts in each of 2007 and 2008.”).

²⁰¹ See Shaun Rein, “How to Win the China Piracy Battle”, Bloomberg.com (20 June 2007), online: http://www.businessweek.com/globalbiz/content/jun2007/gb20070620_006304.htm (“[I]n 2005, 86% of all software used in China was pirated, accounting for a \$3.9 billion sales loss”).

²⁰² Evelyn Iritani, “Bootleggers Raise Stakes in China's Piracy Fight” *L.A. Times* (20 July 2003) C1; Grant Gross, “US, Canadian Agencies Seize Counterfeit Cisco Gear” *CIO.com* (29 Feb. 2008), online: http://www.cio.com/article/190651/US_Canadian_Agencies_Seize_Counterfeit_Cisco_Gear; “EU, U.S. Vow Crackdown on Computer Counterfeits” Reuters (Feb. 22, 2008, 1:00 PM), <http://www.reuters.com/article/2008/02/22/us-eu-usa-counterfeiting-idUSL2285388920080222>.

panel report in 2009.²⁰³ In the report, the US alleged that China's criminal intellectual property laws do not provide a sufficient deterrent to trademark and copyright infringement, thus violating obligations under the TRIPS Agreement.²⁰⁴ Specifically, the US claimed that China had failed to honor its TRIPS commitments by including in its laws high thresholds for applying criminal procedures and penalties to intellectual property infringement contrary to Article 61 and 41.4 of the TRIPS.²⁰⁵ Without determining whether China has satisfied its TRIPS obligations, the WTO panel found that the United States, which offered as evidence press articles and industry and consultant reports, had failed to substantiate its claim.²⁰⁶ As a result, for the time being, China does not have to change its criminal prosecuting threshold. A second claim concerned the ability of the Chinese customs authorities to properly dispose of infringing goods seized at the border contrary to Article 59 and Article 46 of TRIPS.²⁰⁷ Because Article 59 and

²⁰³ Panel Report, China--Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WT/DS362/R (Jan. 26, 2009) (adopted Mar. 20, 2009) [hereinafter Panel Report]. Online at http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm

²⁰⁴ Ibid at para 7.535.

²⁰⁵ The United States argued that Article 61 of the TRIPS Agreement provides that criminal penalties must be available for infringements on a “commercial scale”. Ibid at para. 7.182. The panel found “commercial” to mean “basically, engaged in buying and selling, or pertaining to, or bearing on, buying and selling”. Ibid para. 7.535.

²⁰⁶ “The panel asked the United States to provide quantitative evidence that infringements below one or more of the impugned thresholds were on a commercial scale. As to the factors used to establish the thresholds, the panel stated that qualitative evidence was required. The panel found the evidence mostly anecdotal and therefore questionable as a tool to challenge a standard such as the thresholds.” See Daniel Gervais, Case Summary, “WTO-TRIPS Agreement-Enforcement of Intellectual Property-Copyright on Censored Work--Donation and Auction of Seized Goods-Criminal Prosecution Threshold” (2009) 103 Am. J. Int'l L. 549.

²⁰⁷ Article 59 of the TRIPS Agreement provides:

Without prejudice to other rights of action open to the right holder and subject to the right of the defendant to seek review by a judicial authority, competent authorities shall have the authority to order the destruction or disposal of infringing goods in accordance with the principles set out in Article 46.

Article 46 states further:

In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm

Article 46 only lay out an empowerment obligation, as compared to mandating a specific action, the US could not argue that the Chinese customs authorities had failed to destroy infringing goods seized at the border.²⁰⁸ Nevertheless, the panel faulted China for the way its customs authorities auctioned off the seized goods.²⁰⁹ In the panel's view China did not “create an effective deterrent to infringement” - a key objective of Article 46.²¹⁰

The US, dissatisfied with the effect of the WTO dispute on China's enforcement practices regarding the destruction of infringing goods and criminal prosecution of piracy and counterfeiting, has concluded a negotiation on IPR enforcement outside the WTO, namely the Anti-Counterfeiting Trade Agreement (ACTA).²¹¹

caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed.

See TRIPS supra note 2.

²⁰⁸ As the panel recounted, “[p]revious drafts of the TRIPS Agreement had provided that the authorities shall ‘provide for’ certain remedies, but this phrasing was changed to read shall ‘have the authority’, as were a number of other draft provisions.” See Panel Report supra 204 at 7.238. See Peter K Yu, “TRIPS enforcement and Developing Countries” (2011) 26 Am. U. Int'l L. Rev. 727.

²⁰⁹ As clearly stated in Article 46 of the TRIPS Agreement, the provision that provides the principles incorporated into Article 59, “[i]n regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce.” The panel did not indicate what exactly needs to be done to avoid a violation of Article 59. It suggested that “[p]ractical requirements, such as removal of the trademark, affixation of a charitable endorsement or controls over the use of goods or distribution methods, may avoid confusion.” Although China provided additional measures, such as the solicitation of comments from rights holders and the introduction of an expertly-determined reserve price, those measures, in the panel's view, did not deter infringement. See Yu *ibid*. See Panel Report supra note 206 at P 7.375.

²¹⁰ Pursuant to the panel report, China amended Article 27 of its Regulations on Customs Protection of Intellectual Property Rights (“Customs Regulations”) in spring 2010. See Decision of the State Council on Amendment of the Regulations of the People's Republic of China on Customs Protection of Intellectual Property Rights (promulgated by the St. Council, Mar. 24, 2010, effective Apr. 1, 2010), translated at <http://english.mofcom.gov.cn/article/counselorsreport/asiareport/201005/20100506903349.html> (amending Article 24 of the Customs Regulations to stipulate that “the customs may lawfully auction them after the infringement features have been eliminated, but for imported goods with counterfeited trademarks, except for special circumstances, such goods shall not be permitted to be traded only by clearing off the trademarks” (emphasis added)). See Yu, *ibid*.

²¹¹ The United States, the European Union, Japan, and Switzerland have concluded an agreement encapsulating stronger international intellectual property enforcement norms through the highly controversial Anti-Counterfeiting Trade Agreement (“ACTA”) and other bilateral, plurilateral, and regional trade agreements. Anti-Counterfeiting Trade Agreement, 15 April 2011, I.L.M available at http://www.ustr.gov/webfm_send/2417. “The approach is neither regional nor truly multilateral; it is a “club approach” in which like-minded jurisdictions define enforcement “membership” rules and then invite other countries to join, presumably via other trade agreements.” See Gervais supra 209.

In summary, the US government has for the past 30 years pressured the Chinese government, demanding that it protect the interests of Western businesses by implementing and enforcing international intellectual property laws. Although the Chinese continue acceding to numerous agreements and adopting the relevant intellectual property laws, Western businesses continue complaining that the enforcement of those laws are as bad as ever - and getting worse. The fact that the major problem is the enforcement of IPR supports the fact that the legislation and treaty obligations expected of the parties have moved beyond China's capabilities, which is addressed in the next chapter.

Chapter 3: Analysis of IPR Infringement in US- China Relations

INTRODUCTION

Although this thesis primarily discusses the protection of IPR in China, it should be noted that the recent Sino-American economic relationship has suffered from problems, mainly because the US has held a significant trade deficit with China since the late 1980s.¹ In the 1990s, the US hoped to reduce this trade deficit by exporting intellectual property-based goods.² In order to achieve this objective, it threatened China “with economic sanction, trade wars, non-renewal of most-favored nation status, and opposition to entry into the World Trade Organization.”³ However, by 2005, the US was still considering imposing trade sanctions on China because of its inadequate IPR protection among other issues.⁴ However, irrespective of fluctuations in the Yuan, the trade deficits that other nations have imposed on China, the volume of Chinese exports and the insufficient protection of IPR, there continues to be steady development in the US-China economic relationship.⁵ This is because Western businesses continue to be

¹Peter K. Yu, “From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China” (2006) 55 Am. U. L. Rev. at 103 [hereinafter Yu, Episode II]. “The US goods trade deficit with China was \$266.3 billion in 2008, an increase of \$10.1 billion from \$256.2 billion in 2007. US goods exports in 2008 were \$71.5 billion, up 9.5 percent from the previous year. Corresponding US imports from China were \$337.8 billion, up 5.1 percent. China is currently the third largest export market for US goods. See Office of the US Trade Representative, “China: Trade Summary” in *Foreign Trade Barriers* (2010) at 74, online at, <http://www.ustr.gov/sites/default/files/uploads/reports/2009/N>.

TE/asset_upload_file868_15464.pdf

²Yu, *ibid.*

³*Ibid.*

⁴*Ibid.* at 102.

⁵Investment from Western industrial countries, especially those from North America and Western Europe, has increased steadily throughout the 1990s. In 1992, the US was the fourth largest investor in China, accounting for about 4.6% of total FDI inflow. In 2000, the US became the second largest foreign investing country in China, contributing 10.8% of the total FDI inflow. In 2004 the number of foreign firms was about one third of China’s total number of enterprise. Xialon Fu, “Foreign Direct Investment, Absorptive capacity and Regional Innovation Capabilities: Evidence from China” (OECD, 2007) online: <http://www.oecd.org/dataoecd/44/23/40306798.pdf>. According to the Ministry of Commerce (MOFCOM), China’s main FDI sources are the US, Europe and Japan. MOFCOM reported that China received US\$111.17 billion in FDI in 2008. See Wang Ke, “China Needs More FDI: MOFCOM official” (28 June 2009) China org.cn, online: http://www.china.org.cn/business/news/2009-06/28/content_18027692.htm

willing to relocate their operations to China owing to the low cost of doing business there compared with the developed world.⁶

China's accession to the WTO led to two main consequences. First, Chinese intellectual property laws underwent significant change, "not merely to conform the Chinese intellectual property system to WTO standards, but also to meet the country's rapid-changing local conditions."⁷ Second, the US was no longer allowed to threaten the Chinese with economic sanctions and trade wars because of inadequate intellectual property protection in China.⁸ Instead, it had to file complaints with the WTO and resolve any issues through its official mechanisms.⁹ Thus, China's "legislative frenzy" as a member of the WTO not only meant that "all major intellectual property statutes were substantially revised and supplemented with new administrative regulations and judicial interpretations for the sake of compliance with the ... (TRIPS) standards" but also that "the transparency and anti-corruption reforms in the practice and procedure of the People's Court, government units, cadre system and state-owned enterprises, in conjunction with the central leadership's official endorsement of a "rule of law" strategy of social control, all worked to give law enforcement in general, and intellectual property

⁶An average Chinese wage of \$0.57 per hour -- or \$104 per month -- is about 3 percent of the average US manufacturing worker's wage, according to data collected by Banister. "Equally as striking, regional competitors in the newly industrialized economies of Asia had, on average, manufacturing labor costs more than 10 times those for China's manufacturing workers, and Mexico and Brazil had manufacturing labor costs about four times those for China's manufacturing employees."Richard McCormack, "Good Luck Competing Against Chinese Labor Costs" *13-9 Manufacturing and Technology News* (2 May, 2006) online, <http://www.manufacturingnews.com/news/06/0502/art1.html>

⁷Peter K. Yu, "From Pirates to Partners: Protecting Intellectual Property in the China in the Twenty-First Century" (2000) 50 *Am. U. L. REV.* at 140-51 [hereinafter Yu, Episode 1], at 121

⁸*Ibid.* at 123.

⁹See article 64 of The Agreement on Trade Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments- Results of the Uruguay Round, 33I.L.M1197 (1994)

in particular, new meaning and hence new challenges, quite unimaginable in the 1990s.”¹⁰

However, China was much more successful at changing its legislation to abide by its international obligations than it was at enforcing domestic IPR laws for the reasons described in this chapter. To understand China's enforcement practices, we must first consider whether, and to what extent, Chinese cultural, social, political, and historical factors are the driving force behind its current intellectual property enforcement policy. Although our analysis reveals that these factors play a role in China's attitude towards IPR protection, the reason for considering these factors is to eliminate them as the driving force behind China's lack of enforcement, which enables a negative inference regarding the causal factors influencing Chinese IP practices. Therefore, section 1 considers the long history of Chinese civilization and compares its social and political life, values, and culture with that of the West. Section 2 explores the differences in Chinese and US legal traditions. However, this analysis cannot explain why Western corporations, and especially American corporations, experience great difficulties in protecting their intellectual property rights when dealing with Chinese businesses. As a result, section 3 analyzes the dynamic interaction between low-tech pre-industrial economies and high-tech industrial economies as well as the role of IPR in each in order to conclude that the level of economic development in China influences its degree of IPR enforcement.

¹⁰ See Yu, Episode II, *supra* note 1 at 122.

1. HISTORICAL, SOCIAL, CULTURAL AND POLITICAL INFLUENCES ON CHINA

Throughout China's recognized 4000-year history, the Chinese empire has undergone many changes including the fragmentation and reintegration of Chinese states as well as periods when it was ruled by the Mongols.¹¹ However, despite having suffered the consequences of many wars and disasters, China has managed to preserve its culture and way of life. The Chinese civilization began to flourish at a time when ancient Mediterranean and Middle Eastern civilizations were prosperous and thus it has overcome challenges that might have destroyed less vital and resilient societies.¹² It has also adapted to all changes without surrendering its determination to endure.¹³ Confucius, who lived before the Athenian philosopher Socrates, took it upon himself to teach the Chinese how to think and live,¹⁴ and for most of their history, they have followed his "rational and conservative"¹⁵ teachings. This may account for the resilience of Chinese people and of their ancient civilization.¹⁶

In its modern history, China was a willing recipient of the inflow of foreign capital during the 19th and early 20th centuries. According to Garnet:

"After the Treaty of Shimonoseki, which opened China up to foreign industries, there was an influx of Western and Japanese capital into the open ports and leased territories; foreign countries hoped both to benefit from an impoverished, cheap labor force and to be in the best position to sell their products in China. According

¹¹ The Mongols ruled in the 12th and 13th century.

¹² Jacques Garnet, *A History of Chinese Civilization*, 2nd edition (New York: Cambridge University Press: 1997)

¹³ Ibid. at 272.

¹⁴ Ibid. 87-88.

¹⁵ Ibid.

¹⁶ Ibid.

to some estimates, foreign capital in China rose from 787 million gold dollars in 1896 to 1610 million in 1914. In 1890 there were 499 foreign businesses on Chinese soil. In 1923 there were 6865.”¹⁷

He further states:

“Round about 1920 the whole Chinese economy was dependent on the big foreign banks in Shanghai, Hong Kong, Ch’ing-Tao, and Hankow, and on powerful companies such as the Kailan Mining Association, the capital of which was Japanese. The customs, the administration of the salt tax, and the postal services were run by foreigners, who kept all the profits. Western and Japanese warships and merchant shipping were everywhere- in the ports, on the coast, and on the Yangtze River network. Apart from a few Chinese firms which succeeded with difficulty in fighting the competition to which they were subjected, the whole modern sector of industry (cloth mills, tobacco factories, railways, shipping, cement works, soap factories, flour mills and, in the towns, the distribution of gas, water, and electricity, and public transport) was under the control of foreign companies. Chinese banking, industrial and commercial capital was much smaller than the British, American, Russian, Japanese, and French capital invested in China. The big Western banks in Shanghai controlled the essential part of Chinese revenues, in particular the maritime customs. In addition, they attracted all the private capital seeking reliable protection, which it could not find with the Chinese banks.”¹⁸

¹⁷Ibid at 612-613.

¹⁸Ibid at 613.

Although foreign investment into and domination over the Chinese economy contributed little to domestic economic prosperity, it forced the Chinese to face up to the growing levels of industrialization in the Western world. Conservative Chinese rejected both the influence of the West and its approaches towards “modernization.” Indeed, the so-called “boxer rebellion” was inspired by traditional Chinese people’s attitudes towards foreign influence.¹⁹ The middle class, however, was willing to accept the modern industrial economy and the capitalist way of doing business. The most active and ambitious Chinese political activists turned to radical revolutionary European ideology and were inspired by leaders such as Marx and Lenin. With the support of Chinese peasants and the poor communities of Chinese cities, these political activists seized power, and in 1949, created the People’s Republic of China.²⁰ Although the first half-century of the People’s Republic was certainly eventful and oftentimes difficult, by the end of the 20th century²¹ China had entered a period of greater stability and it was beginning to become a successful partner in the process of economic globalization.

That is not to suggest that China and the West share political, religious or spiritual ideologies. For example, according to H.J. Muller, Chinese civilization has always been less religious compared with Western countries:²²

“It had no belief in a personal Creator, no divinely inspired scriptures or commandments, no idea of original sin, no sharp dualism of body and soul, no priesthood with high privileges, no powerful church, its God was Heaven, an

¹⁹Ibid at 606.

²⁰Ibid. at 616.

²¹Ibid at 734-735.

²² H.J. Muller, *Freedom in the Modern World* (New York: Harper & Row, Publishers, 1966) at 489.

impersonal moral order that was to be respected, not loved or feared, and that authorized no idea of either personal salvation or damnation.”²³

However, Muller claims that the Chinese have always been more devoted than are Westerners to spiritual ends.

“They did not worship mammon either; their most cherished goods were ethical, aesthetic, and intellectual; they never exalted business, ranking merchants at the very bottom of the social scale, and although an uncommonly practical, inventive people, they never developed anything comparable to modern science or modern technology. As a practical people they made it their primary business to order harmoniously the human world, neither to conquer nor to escape the physical world. It was for such reasons - not military might or imperial conquests - that over the many centuries the Chinese took for granted the superiority of their civilization, that they then had so hard a time adjusting themselves to the superior power of the West.”²⁴

The Chinese and developing nations in the West also differed markedly in their approaches to innovating. The Chinese quickly realized that Western industrial development derived from its capacity to introduce machines into production and harness scientific research in order to invent new machines and technologies. Although China has been responsible for many inventions, such as the magnetic compass, gunpowder, and porcelain,²⁵ it failed to create a European style approach to science and technology because it ranked merchants “at the very bottom of the social scale.”²⁶

²³ Ibid.

²⁴ Ibid at 489-490.

²⁵ Ibid 497.

²⁶ See above quote, supra note 26.

Indeed, Chinese cities were part of the imperial establishment and thus they were dominated by civil mandarin servants, whose educations consisted mostly of philosophy, literature, history and politics.²⁷ By contrast, European science and technology was created in the heart of European cities, which were populated by traders, merchants, artisans, bankers and academics who were more interested in the natural sciences than they were in aesthetics and moral philosophy.²⁸

European cities also enjoyed autonomy and were sheltered from feudal and theocratic tyranny.²⁹ In this sense, Europe was the oasis of both business and free thought, ending the dark ages of European feudalism and taking the center stage of European history during the Renaissance.³⁰ The new class that populated European cities, namely the bourgeoisie, transformed the West into an advanced scientific and technological civilization and made the Industrial Revolution and the capitalist economy a dominant force.

China lacked modern technology, an energetic middle class and enterprises capable of collaborating with the West,³¹ and thus it was unable to resist Western expansion even though the result was the fragmentation of the Chinese state. It was not until the radical actions of the communists that foreign domination and the ruling of warlords ended in China. The communists achieved two goals: they unified the country

²⁷Ibid at 316-318.

²⁸ See generally Henri Pirenne, *Medieval Cities, Their Origins and the Revival of Trade* (N.J.: Princeton University Press, 1980).

²⁹ See generally Henri Pirenne, *Economic and Social History of Medieval Europe* (Florida: Harcourt Brace & Company, 1937).

³⁰ Ibid.

³¹ See Muller supra note 24.

and empowered the Chinese.³² Unlike in Russia, the destruction of the political party and country did not occur in China; rather, the Chinese sought to return to their ancient wisdom and began to view business in traditional ways.³³ During that period, cooperation with the West was considered to be the best way to transform China into a developed country.³⁴

Further, the social and political lives of the Chinese have throughout history been lived within the framework of their families and their social and political lives have been guided by “a highly centralized state ruled by an autocratic emperor called the son of heaven.”³⁵ To rule such a vast empire, emperors have had to employ a huge bureaucracy that controlled all activities in Chinese cities and society.³⁶ The main purpose of Chinese life “was not to extend freedom or promote growth, but to secure social order, harmony and stability.”³⁷

Unlike Europeans, the Chinese were not primarily interested in expansion and growth.³⁸ Rather, they focused on improving and refining traditional activities, not on inventing novel apparatus that could pose a threat to the stability of their material and spiritual existence.³⁹ This accounts for the long survival and durability of the Chinese civilization, but also helps explain the absence of a “great leap forward” in mastering scientific thought and industrial technology.⁴⁰

³² Ibid.

³³ Peter K. Yu, “Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the US-China Intellectual Property Debate” (2001) 19 B.U. INTL L.J. at 1, 8.

³⁴ Ibid.

³⁵ See Muller, *supra* note 24 at 303.

³⁶ Ibid.

³⁷ Ibid. at 491.

³⁸ Ibid. at 351.

³⁹ Ibid.

⁴⁰ Ibid.

It took a European type of ideology and a Marxist type of dictatorship to rid the Chinese of their traditional conservatism and to awaken in them the drive and determination to master European technology and business manner.⁴¹ In order to be successful in that endeavor, Chinese people had to acquire, digest and enforce Western laws and rules without which the Western way of doing business could not be successful.⁴² Yet, China continues to experience great difficulties in mastering Western intellectual property laws.

The above analysis could explain why the Chinese have not developed a European type of industrial economy and science, and recent changes in Chinese political and social life can explain why China is now determined to co-operate with the West and transform itself into a modern industrial country, but it cannot explain why Western corporations, especially American corporations experience great difficulties in protecting their intellectual property rights in their dealings with Chinese businesses.

2. LEGAL DIFFERENCES BETWEEN THE US AND CHINA

Chinese refusal to fully comply with IPR is not because of defects in Chinese legal practice or thought. On the contrary, the Chinese legal tradition is as ancient as Chinese history itself. As early as the fourth and third centuries B.C.E., thinkers known as “legalists” (*Fa-Chia*) developed an elaborate legal theory according to which “politics” is not a matter of morality.⁴³ They understood “that the basis of the very power of the state resides in its political and social institutions”⁴⁴ and believed that “the state

⁴¹ Ibid.

⁴² See fn 106 in Chapter 1.

⁴³ See Garnet supra note 14, at 90-91.

⁴⁴ Ibid.

and its subjects must respect the sovereignty of the law.”⁴⁵ Legalists believed in equality before law in that they made “no difference between nobles and the common people; they let them all be judged by the law, so that relationships based on affection and respect are abolished.”⁴⁶

This notion of equality has had a lasting effect on Chinese civilization. According to Garret, “the contribution made by the Legalists in the realms of law and of political, social, and administrative organization was a fundamental one and legalism has continued to inspire Chinese political thinking down to our own day.”⁴⁷

However, Peter K. Yu is doubtful about “the effectiveness and expediency of the legalistic approach usually taken by Western companies” in the matters of intellectual property rights in China.⁴⁸ He continues by saying “to some extent, the discussion is reminiscent of the differences between the Chinese and Western legal cultures and of the millennia-old debate between the Confucianists and the Legalists in China”⁴⁹ Peter K. Yu quotes Confucius: “Govern them by moral force, keep order among them by ritual and they will keep their self-respect and come to you of their own accord”⁵⁰ Accordingly “In a Confucian society, people learn to adjust their views and demands to accommodate other people’s needs and desires, to avoid confrontation and conflict, and to preserve harmony”⁵¹

Yu offers a highly significant observation of the Chinese attitude towards laws:

⁴⁵ Ibid.

⁴⁶ Ibid. at 93.

⁴⁷ Ibid.

⁴⁸ See Peter Yu, Episode II, *supra* note 1 at 164.

⁴⁹ Ibid.

⁵⁰ Ibid. at 165.

⁵¹ Glen R. Butterson, “Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and prospects of Chinese Enforcement” (1996) 38 Ariz. L. Rev. 1081, 1109-10 discussing the concept of *li* and social roles.

“The legalists, by contrast believed it was impossible to teach people to be good. Laws and punishment (*fa*), therefore, were needed to maintain public order by instructing people of what and what not to do. Although Legalism was embraced in a very short period of time in the Qin dynasty (221-207 B.C.), it never dominated the Chinese society until very recently. In fact, *fa* was often associated with the harsh, despotic, and unpopular Qin rule that united the country and centralized its bureaucracy. As the Chinese would reason, “when government leans heavily on *fa* to reinforce its authority, it does so because it has no effective ability to rule by *li*.” Thus, to many Chinese, laws should be used only as the last resort.⁵²

Therefore, the main difference between the West and China is how they each handle conflicts of interest. In Western countries, especially in the US, litigation is preferred to settlement through negotiation and discussion. By contrast, the Chinese believe that conflict resolution is better achieved through mutual accommodation.⁵³

In summary, the Western and ancient legalistic Chinese interpretation of the rule of law relies on power and the authority of the courts and legal processes, whereas the traditional Chinese interpretation views the law as a guiding principle in negotiations and in the amicable settlement of differences.⁵⁴ Although this diversity can help explain the perceived lax approach to law and IPR in China, the real cause of the problem may be found by analyzing the nature of the Sino-American economic relationship and the motivation and interests behind it.

⁵² See Yu, Episode II, *supra* note 1 at 165.

⁵³ Traditionally, courts have been perceived as outside the Confucian norms of behavior and are to be avoided, since court proceedings expose the conflict and disrupt the harmony in the group. See Jonas Alsen, “An Introduction to Chinese Property Law” (1996) *Maryland Journal of International Law and Trade* 1, at 4-5 and 14.

⁵⁴ *Ibid.*

3. ECONOMIC FACTORS: THE RULE OF LAW AND COMMERCIAL INTERESTS

Despite China's long history, it has entered into recent relationships with Western businesses as a relatively underdeveloped economy.⁵⁵ As such, China has found itself in a position similar to other developing countries, and has faced pressure from Western demands.⁵⁶ All developing countries, including China, grant Western businesses entry in order to facilitate the gradual transformation from non-industrial to industrial economies.⁵⁷ In order to achieve this, however, developing countries are sometimes forced to meet the demands of Western businesses in terms of both the labor market and the market for goods and services. Thus, most developing countries, perhaps China more than any other, have experience in dealing with foreign businesses entering their market under "optimal conditions imposed by foreigners."⁵⁸ For the most part, these entry criteria negatively affected the domestic economy and domestic businesses.⁵⁹ This helps explain why developing countries often choose to act in accordance with their own

⁵⁵In terms of per capita GDP, China is still one of the poor developing countries. See United Nations Statistics Division, online: <http://unstats.un.org/unsd/demographic/products/socind/inc-eco.htm>. In terms of technological sophistication, China is well behind the industrial world. Basic innovation is weak among domestic firms. R&D intensity is much lower than in OECD countries, and three-quarters of existing R&D is in development, rather than in research. In terms of patent applications, they are dominated by foreign firms. See OECD, "Measuring China's Innovation System National Specificities and International Comparisons" (2009) STI WORKING PAPER 2009/1 Statistical Analysis of Science, Technology and Industry at 46 -64. [Hereinafter OECD, "Measuring China's Innovation"].

⁵⁶The trade-relatedness of IP protection and its integration into the WTO regulation framework has considerably reduced the policy space of most of the countries in the world -including China. This is due to the fact that - unlike in previous regulation regimes under the aegis of the World Intellectual Property Organization (WIPO)- minimum standards of IP protection have become so inextricably linked with the international free trade architecture that they combined have become a "take-it-or-leave-it" package especially for developing countries. Wechsler, "Intellectual Property in the P.R. China: A Powerful Economic Tool for Innovation and Development" 09-02 Max Planck Institute for Intellectual Property, Competition and Tax Law, online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1354546## at 16.

⁵⁷See fn 7 in Chapter 1.

⁵⁸See supra note 19-20.

⁵⁹Ibid.

interests rather than in accordance with the rules stated in the agreements and laws imposed on them by their powerful partners.⁶⁰

Furthermore, unlike many developing countries,⁶¹ China is neither small nor does it lack influence, which makes it more or less an equal partner in its relationship with the West.⁶² The nature of this equal partnership results in an interesting dynamic in the economic relationship between Chinese and Western businesses, especially with those in the US.⁶³ This interesting dynamic has resulted in impressive overall growth in the Chinese economy and an equally impressive transfer of technology and knowledge for

⁶⁰See fn 48 in Chapter 1.

⁶¹Robert Ostergard described the "development dilemma" that TRIPS posed for poorer countries in the following terms:

[I]f they open their domestic markets to trade, they face political and economic pressure to protect foreign IP; if they protect foreign IP, they create conditions that force them to abandon their goal to obtain IP as inexpensively as possible.

Robert L. Ostergard, Jr., "Economic Growth and Intellectual Property Rights Protection: A Reassessment of the Conventional Wisdom in Intellectual Property, Trade and Development" in Daniel Gervais, *Intellectual Property, Trade and Development* (New York : Oxford University Press, 2007) 115 - 155. Homere observed what can occur when IPR's are successfully enforced in developing countries:

...Since a strong IPR system is generally a prerequisite for FDI in poorer countries, stronger intellectual property laws displace individuals that once made a living in the market for pirated and counterfeit goods. For instance, in Lebanon, shortly after adopting a stronger IPR system, piracy and counterfeiting activities decreased while unemployment increased.

See Jean Raymond Homere, "Intellectual Property Rights Can Help Stimulate the Economic Development of Least Developed Countries" (2004) 27 Colum. J.L. & Arts 277 at 290.

Robert Bird made similar observations on the effects that coercive measures by the West to enforce IPR's can have on developing economies: "trade sanctions applied [to enforce foreign IP interests], can devastate the economies of developing countries." Robert C. Bird, "Defending Intellectual Property Rights in the BRIC Economies." (2006) *American Business Law Journal* 317 at 335.

⁶²Even though the TRIPS Agreement has, to a large extent, reduced Chinese policy space to regulate IP matters, Chinese proactive IP policies and lack of IP enforcement undermine US and Western attempts, such as WTO action against China, to pressure China into IP protection compliance. The case of China thus demonstrates that - due to China's sheer size but also due to its growing economic and political importance - China is to some extent defying the limitation of policy space in the field of IP protection through integration of this area into international trade policy. See Wechsler, supra note 63 at 18.

⁶³See Office of the US Trade Representative, "US-China Trade Relations: Entering a New Phase of Greater Accountability and Enforcement Top-to-Bottom Review, February 2006, US Trade Representative. Executive summary" (Washington 2006) online <http://www.ustr.gov/node/359>

at 2 which stated :

"Indeed, since 2001, US exports to China have grown five times faster than they have in the rest of the world, and China has gone from being the 9th to the 4th biggest export market for the US....

The trade relationship between our two countries has become increasingly central to the economies of both our countries. China's economy has been growing at roughly ten percent a year for more than two decades, and its growth has been closely tied to the open trade and investment regimes of the major economies of the world."

which Chinese businesses strongly strive.⁶⁴ Judging by reported complaints from Western companies, this includes a desire for the intellectual property of Western corporations that trade in China.⁶⁵ Indeed, Chinese businesses are able to acquire Western technology and knowledge at a speed that enables them to survive and grow in the face of foreign competition. Their success and boldness in pursuing self-interest is acknowledged with alarm by Western businesses and governments.⁶⁶

Although the US-China relationship revolves around their business interactions,⁶⁷ this often leads to a major conflict of interests. The philosophy of the US government is simpler than that of its counterpart, namely wherever US corporations go, so do American laws.⁶⁸ Because the Chinese government needs US corporations, it is thus forced to comply with this philosophy.⁶⁹ Therefore, adopting US rules and laws, especially intellectual property laws, is a necessary step towards achieving China's goal

⁶⁴UNCTAD confirmed that FDI plays a key role in technology transfer: "As major innovators, TNCs are the main sources of international technology transfer." UNCTAD, World Investment Report 2002, online at, website: stdev.unctad.org/un/p2report.doc

⁶⁵Anecdotal evidence indicates that firms violate the intellectual property rights of both foreign and Chinese firms to acquire these skills and technologies. See chapter 2, section 4 above.

⁶⁶Ibid. Also consider the following statement by Ambassador Ron Kirk: "We are seriously concerned about China's implementation of 'indigenous innovation' policies that may unfairly disadvantage US IPR holders. Procurement preferences and other measures favoring 'indigenous innovation' could severely restrict market access for American technology and products. Creating an environment that nurtures innovation and entrepreneurship is a worthy goal, but China must maintain a level playing field." See USTR Special 301 Report (2009) supra note 70.

⁶⁷ See supra note 5.

⁶⁸Commentators have suggested that this is because trade negotiations are "captured by industry." See Suzanne Scotchmer, "The Political Economy of Intellectual Property Treaties" (2004) 20J.L. Econ.& Org. 415.

⁶⁹Modern Chinese IP policy in the late 1990s was marked by one of the strongest forces shaping Chinese IP policy to adopt Western legal rules: the prospect of joining the international trade circle through membership in the WTO. As in the primary phase of modern Chinese IP policy, however, this prospect worked in conjunction with US coercion on China to better protect foreign IP interests in China. See Wechsler, supra note 63, at 37.

of developing an industrialized economy⁷⁰ and pursuing a more sophisticated and productive Chinese economy and society.⁷¹

However, the Chinese government is faced with certain economic realities that limit its power to enforce these laws. The inherent movement towards a free market economy in China means that the government, although having a strategic influence on the economy, has very little effect over individual business activities,⁷² while Western multinationals have every advantage, except the ability to protect their intellectual property against new entrants.⁷³

The Chinese government is not helped by the fact that domestic businesses focus more on present operations than they do on making decisions that would benefit them in the long-term. This is typical of the business approach in developing countries; businesses direct resources to instantly succeed in challenging and competitive market

⁷⁰See Gervais, *Ibid* (Arguing that IP law is a necessary (though insufficient) condition for achieving an innovative economy). See also Daniel J. Gervais, “Intellectual Property, Trade and Development: The State of Play” (2005) 74:2 *Fordham L. Rev* at 510 (concluding that without IP protection, economic development will not occur at an optimal level). See also generally Peter Yu, *Intellectual Property, Economic Development, and the China Puzzle* in Daniel Gervais, *Intellectual Property, Trade and Development* (New York: Oxford University Press, 2007) 173-220 .

⁷¹*Ibid*. Policymakers in most Asian countries that are already committed to becoming players in the knowledge economy clearly understand they will not reach the frontiers of that economy nor will they convert their economies' intangible, nonrivalrous outputs into tradable knowledge goods, without articulating appropriate intellectual property laws and policies, along with a whole set of interrelated economic and political foundations that are essential to maintaining a viable post-industrial economy. See Jerome Reichman. “Intellectual Property in the 21st Century: Will the Developing Countries Lead or Follow” (2009) *Houston Law Review* 1115 at 1119. See also Peter Yu, *ibid* at 173,195. To this end, China's third amendment of its Patent Law in 2008 expressly reflects "the needs of development of China herself," which require "the promotion of . . . independent innovation and the establishment of an innovation-oriented country." Xiaoqing Feng, “The Interaction Between Enhancing the Capacity for Independent Innovation and Patent Protection: A Perspective on the Third Amendment to the Patent Law of the P.R. China” (2009) *U. Pitt. J. Tech. L. & Pol'y* 1 at 6.

⁷² Refer to Chapter 1, section II.C. discussing the changed role of the Chinese government since their adoption of the “socialist market economy.”

⁷³It has been argued that the only comparative advantage of LDC's, who are net importers of technology, is their ability to imitate the technology of developed countries. Innovation is not a major source of economic activity in these countries and from the theory of comparative advantage, it is wise, from an economic perspective, for an LDC to choose a less stringent intellectual property regime than a country whose economy is highly dependent on innovation. See Trebilcock & R. Howse, *The Regulation of International Trade* (New York: Routledge, 1995).

environments. Although their long run objectives are to grow and compete alongside large corporations from developed countries, they see little benefit in IPR that are meant to serve them in the future.

Low-cost labor not only attracts foreign investment into China, it also plays a considerable role in the impressive growth in the national economy.⁷⁴ However, low-cost labor alone would hardly account for this degree of economic growth. The main reason for this success is the “invasion” of the Chinese market by sophisticated and powerful foreigners, primarily US corporations that invest capital, equipment and technology - in other words, their intellectual property.⁷⁵

In terms of retail prices, Chinese businesses are also typically in a disadvantaged position relative to Western corporations.⁷⁶ Therefore, it is popularly believed that the only manner in which they can create an equitable competitive environment is by “borrowing” knowledge from Westerners.⁷⁷ This degree of unconstrained abuse of IPR is

⁷⁴China continues to rely greatly on external technology to this day, and Chinese enterprises continue to rely on cheap labor rather than technological prowess. While no one can accuse the Chinese state of not trying, it is clear that it has yet to find a workable model for technological development. Yu Zhou, “The Inside Story of China's High-Tech Industry” (2008). One of the reasons Chinese firms remain competitive is because they pay their workers even less than foreign companies. See Wendy Dobson, “The Transition from Imitation to Innovation: An Enquiry into China’s Evolving Institutions and Firm Capabilities” (2008)19 *Journal of Asian Economics* (China’s growth is based on two things: labor intensive production and technological imitation). See also Zijan Wang and Jiegen Wei, “The Sources of China’s Economic Growth: 1952-1998” (2004) (available on SSRN)(labor and technological adoption account for China’s growth: capital contribution is a much less significant factor).

⁷⁵The most important factors accounting for China’s growth are imported ideas and technology, ie imitation. The most important channel for imitation is through knowledge spillovers from foreign-owned firms to domestic firms and agents of production. See Wendy Dobson *ibid.* at 301,302 and 311. See also Zijan Wang and Jiegen Wei *Ibid.*(stressing technological adoption as the most important factor in China’s growth).

⁷⁶Most research acknowledges that MNCs enjoy tremendous advantages over local firms, and that the latter’s interests are best served by avoiding head-to-head competition, in which they are likely to perform poorly. Jie Wu and Nitin Pangarkar, “Rising to the Global Challenge: Strategies for Firms in Emerging Markets”(2006) 39 *Long Range Planning Journal* at 296.

⁷⁷The Chinese have been experiencing tremendous success because of their imitation paradigm. See Wechsler *supra* note 63 at 43. Imitation is one of the most important factors in China’s “catching up” (see Dobson, *supra* note 82), which according to “convergence theory” in economics, should continue to take place until the developed and developing world converge in terms of per capita income. According to

further enabled because intellectual property laws are too weak to prevent it,⁷⁸ and traditional Chinese thinking does not believe that it is wrong.⁷⁹ Indeed, the widespread pirating of intellectual property by Chinese companies⁸⁰ is, at this stage in China's

convergence theory, the fact that a country is poor does not guarantee that catch-up growth will be achieved; the poor country must have "social capabilities" to achieve catch up growth. These include an ability to absorb new technology, attract capital and participate in global markets, where the capacity to absorb technology is among the most important. According to Abramovitz, these prerequisites must be in place in an economy before catch-up growth can occur, and explains why there is still divergence in the world today. See Moses Abramovitz, "Catching Up, Forging Ahead, and Falling Behind", (1986) 46:2 *The Journal of Economic History* 385. The BRIC economies (Brazil, Russia, India and China) on the other hand are experiencing "convergence" and considerable growth: "All of these countries have become important not by embracing IP first but by actually being anti-IP first, and that goes for all BRIC economies." See Linda Yueh, "Technological Drivers of BRIC Economies: Public Versus Private Sector Control" (2007) *Northwestern Journal of Technology and Intellectual Property* 1 at 3. It has been argued that the only comparative advantage of LDC's, who are net importers of technology, is their ability to imitate the technology of developed countries. Innovation is not a major source of economic activity in these countries and from the theory of comparative advantage, it is wise, from an economic perspective, for an LDC to choose a less stringent intellectual property regime than a country whose economy is highly dependent on innovation. See Trebilcock & R. Howse, *The Regulation of International Trade* (New York: Routledge, 1995).

⁷⁸ IPR's prevent convergence by making imitation more costly. See Yueh, *Ibid* at 50. In the case of developing economies, the benefits of piracy seem to outweigh the costs; especially when monetary fines are low or incarceration is unlikely, IP right infringements are more apt to occur. Even though the Chinese government regularly enforces IP right infringements and raids the violating production facilities, many believe that there are not sufficient penalties and punishments to deter counterfeiters and reduce recidivism. Even though the law does potentially provide for civil penalties and potential criminal prosecution for both patent law and trade secret violations, uncertainty in judgments and varying penalties may not provide transparent costs to potential infringers. Robert Bejesky "Investing In The Dragon: Managing The Patent Versus Trade Secret Protecting Decision For the Multinational Corporation in China" (2004) *Journal of Comparative and International Law* 438 at 481.

⁷⁹ Unauthorized copying was not recognized as a legal wrong in China until the concept was introduced by Western powers in the late 19th Century. See Eric Priest, "The Future of Music and Film Piracy in China" (2006) 21 *Berkeley Technology Law Journal* 795 at 803.

⁸⁰ "The most severe piracy is pursued by legitimate and powerful business men and piracy commonly supports entire local economies with pirated goods intended for large scale commercial trade, both domestically and abroad." See Wang, Note, "The Current Economic and Legal Problems Behind China's Patent Law" (1998) 12 *Temp. Int'l & Comp. L.J.* 1, 209 at 28, Daniel C.K. Chow, *A Primer on Foreign Investment Enterprises and Intellectual Property Protection in China* (2002) at 180 n 85. The livelihood of people in some villages is wholly dependent on the production of pirated goods. Maggie Farley & James Gerstenzang, "China Piracy of U.S. Products Surges Despite Accord" *L.A. Times* (10 Oct. 1995) A1, online: <http://articles.latimes.com/1995/oct/10>. Entire industries have developed that owe their very existence to the ability to pirate. Recognizing that a strong demand for goods with high technological or innovative content exists both within their own domestic markets and outside their borders, many LDCs have engaged in the unauthorized and uncompensated reproduction of products with IP content. Such appropriation has been facilitated by technologies which themselves aid in the reproduction process. Intellectual property can be transferred more efficiently today by means of modem, Internet, cable, satellite, and fax. Copyrighted material can be replicated by way of high-speed photocopiers and scanners. The result has been the emergence of an international market for counterfeit and pirated goods operating parallel to and in competition with the legitimate market for these. . See Rafik Bawa, "The North South Divide Over Intellectual Property" (1997) 6 *Dal J. Leg. Stud.* 77 at 85. . See also Samantha Wu, "Effective

development, crucial to the survival and success of many, if not all, domestic businesses.⁸¹

The US also has experience of this phenomenon in the areas of alcohol and drugs. For example, Prohibition failed to prevent people from manufacturing and consuming alcohol,⁸² while anti-drug laws illustrate that strong efforts and strict legal initiatives cannot prevent people from buying and consuming drugs.⁸³ The fact that alcohol and drugs are arguably less important compared with business survival in a competitive market should provide an insight into the nature of the problem with respect to intellectual property in China, or in any developing country for that matter.

Enforcement of Intellectual Property Rights in China: A Real Possibility” (2006) *Dartmouth Law Journal* at 34 (discussing the importance of pirating to domestic economy).

⁸¹Protecting the interests of MNCs would undermine China's economic progress and survival. See Catherine Gelb, “Patents versus Profits” *China Bus. Rev.*(1 Nov. 2002) at 9, online at LEXIS, CHBUSR. Weaker patent protections can foster economic growth within a country. See generally Robert P. Merges & Richard R. Nelson, “On the Complex Economics of Patent Scope” (1990) 90 *Colum. L. Rev.* 839. Also consider that until Japan became industrialized, it was the hot spot for counterfeit products in the 1960s, followed by Hong Kong in the 1970s, and Taiwan and South Korea in the 1980s; significantly, industrialization had a direct correlation with these countries clamping down on intellectual property infringement. See “Imitating Property Is Theft” *The Economist*, (17 May 2003) at 54, online at, <http://www.highbeam.com/doc/1G1-101950202.html>.

⁸²Prohibition was the period from 1920 to 1933, during which the sale, manufacture, and transportation of alcohol for consumption were banned nationally as mandated in the Eighteenth Amendment to the US Constitution. Many social problems have been attributed to the Prohibition era. Organized bootlegging manifested in response to the effect of Prohibition and a profitable, often violent, black market for alcohol flourished. Powerful gangs corrupted law enforcement agencies, leading to racketeering. Stronger liquor surged in popularity because its potency made it more profitable to smuggle. At the end of Prohibition, some supporters openly admitted its failure. A quote from a letter, written in 1932 by wealthy industrialist John D. Rockefeller, Jr., states:

“When Prohibition was introduced, I hoped that it would be widely supported by public opinion and the day would soon come when the evil effects of alcohol would be recognized. I have slowly and reluctantly come to believe that this has not been the result. Instead, drinking has generally increased; the speakeasy has replaced the saloon; a vast army of lawbreakers has appeared; many of our best citizens have openly ignored Prohibition; respect for the law has been greatly lessened; and crime has increased to a level never seen before.”

See Daniel Okrent, *Great Fortune: The Epic of Rockefeller Center* (New York: Viking Press, 2003) at 24.

⁸³Some 19 million Americans use illicit drugs at least once per month, spending by most conservative estimates over \$60 billion annually in a diverse and fragmented criminal market. The Department of Defense spends approx. \$930 million annually towards the enforcement of US drug laws. See CRS Report for Congress, “International Drug Trade and US Foreign Policy” (2006) online at <http://fpc.state.gov/documents/organization/76892.pdf> at 1 and 11.

Moreover, similar issues to IPR protection in China have occurred in other countries at comparable stages of their technological development. For example, in 1865 the Dutch abolished a Patent Act because of pressure from small and medium-sized businesses who claimed that the act was “an obstacle to the growth of industry and prejudicial to the national prosperity.”⁸⁴ No longer having to pay royalties, Dutch companies were able to reduce production costs, allowing them to be more competitive.⁸⁵ Only in 1912 did the Dutch reintroduce a patent law under pressure from their trade partners.⁸⁶

There was also very little in the way of IPR protection in Switzerland between 1850 and 1907. This allowed Swiss companies to freely use and modify the inventions of others,⁸⁷ which helped many, especially in the chemical industry.⁸⁸ Under international pressure, Switzerland changed the law in 1907, introducing patent protection, except for chemical substances, which remained excluded from the law until the mid-20th century.⁸⁹

As mentioned in Chapter 2, the US itself long refused to pay royalties to foreign authors, and a similar discrimination against foreigners existed in its legal treatment of patents. According to May, “The US system was designed for clearly political reasons, to discriminate in favor of US inventors. Discrimination against foreigners served the public interest and was a common policy to encourage technological transfer.”⁹⁰ These examples

⁸⁴ Roger Cullis, *Fiat Lex: The Role of Law in Early Development of the Electric Light Industry; Intellectual Property Rights, Economic Development and Social Welfare: What Does History Tell Us?* (Coalbrookdale, UK: ESRC Research Seminar Series, 2004) at 39.

⁸⁵See Eric Schiff, *Industrialization Without National Patents: The Netherlands, 1869-1912; Switzerland, 1850-1907* (New York: Princeton University Press, 1971) at 77-81.

⁸⁶Ibid.

⁸⁷Ibid at 89-93.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰See Christopher May and Susan K. Sell, *Intellectual Property Rights: A Critical History*, (Boulder, Colo.: Lynne Rienner Publishers, 2006) at 113.

demonstrate that the treatment of IPR depends on the commercial interests of a nation and its businesses, which is as relevant today as it was in the past.

Both Chinese businesses and the Chinese government treat the relationship with foreign corporations as an opportunity for transferring and acquiring foreign technology and business know-how.⁹¹ There is one fundamental difference, however. For Chinese businesses, especially small and medium-sized private firms, the transfer of technology serves their short-term interests, whereas for the Chinese government, the transfer of technology is a long-term strategic goal.⁹² Yu emphasizes that Chinese leaders have long believed that the transfer of technology is more important compared with the cost and quality of service.⁹³ For example, when China was exploring opportunities to set up joint-production ventures in the telecommunication field, it elected to collaborate with a Belgian firm partly because of its willingness to transfer advanced switching technology.⁹⁴ Another general comment about the Chinese treatment of the transfer of technology is:

“Those who were ready to transfer more cutting-edge technologies and to hand in the underlying capabilities were amply rewarded: they were granted permission to locate in the most desirable areas; given preferential governance and equity terms;

⁹¹ China has a very aggressive foreign direct investment policy and industrial policy specifically aimed at getting technology in foreign direct investment, initially through mandating foreign direct investment to come in the form of joint ventures, which all the literature suggests has more technology transfer potential. And then in the mid 1990s, by creating what are known as high technology development zones, a special form of special economic zone which are geared at attracting the technology embodied in foreign direct investment and then married to R&D facilities so that they can develop technologically to stimulate economic growth. See Yueh, *supra* note 85, at 42. See also Michael Hickman, “M&A in China: Communication without Borders” in *Best Practices for Mergers and Acquisitions in China* (Aspatore, 2008) at 10 (stating the government authorities have historically preferred corporate investors who bring high technology and advanced management techniques from their global operations in the industry”) See also Oded Shenkar, *The Chinese Century, The Rising Chinese Economy and its Impact on the Global Economy, the Balance of power and Your Job* (2005) at 60-70

⁹² *Ibid.*

⁹³ See Yu, Episode II, *supra* note 1 at 163.

⁹⁴ See Yu, *Ibid.*, citing Xiaboai Shen, *The Chinese Road to High Technology: A Study of Telecommunication Switching Technology in the Economic Transition* (1999) at 63.

provided with prolonged tax holidays and duty exemptions; and, perhaps most importantly, given preferential access or the promise of access to the much coveted domestic market.”⁹⁵

Regardless of the actions of individual businesses in terms of IPR protection, the Chinese government, because of its long-term strategic interests and its goal to make China a successful, rich and respectable nation has little choice but to implement international intellectual property laws because they are integral to highly developed industrial economies.⁹⁶

However, the transfer of technological knowledge or Western intellectual property will not be sufficient to turn China into a great industrial and political power.⁹⁷ The Chinese must adopt the Western way of doing business, which also includes its policy of investing into education and science and technological research in order to create its own intellectual property.⁹⁸ Thus, the Chinese government is currently investing

⁹⁵ See Shenkar *infra* note 165 at 67.

⁹⁶ *Ibid.*

⁹⁷ China continues to realize the importance of both the unhampered influx of knowledge and intellectual property into China and the promotion of domestic innovation. As a result, it has come to embed its IP policy into the framework of an overall pro-innovation industrial policy which protects domestic S&T innovations. A recent amendment of the Chinese Science and Technology Progress Law puts enormous emphasis on the role of IP policies in the promotion of science and technology in China while considering science and technology as the primary productive force in socialist modernization. Article 3 of the law explicitly demands that “the state and the whole society shall respect knowledge, esteem talent, value the creative work of scientific and technological personnel, and protect intellectual property rights.” [Law of the People’s Republic of China on Science and Technology Progress, adopted at the Second Meeting of the Standing Committee of the Eighth NPC on July 2, 1993, promulgated by Order No. 4 of the President of the People’s Republic of China, and effective as of October 1, 1993; revised on December 29, 2007, in Gazette of the State Council 2008, No. 2. English translation available at: http://www.most.gov.cn/eng/policies/regulations/200412/t20041228_18309.htm (Status August 15, 2008). China understands that with lack of incentives provided by an IP system, domestic enterprises will remain focused too long on imitating foreign competitors and will make small product adaptations and design improvements and be unable to develop the capabilities to introduce new products or processes. Such a pattern would be difficult to change unless and until outdated institutions and incentives are appropriately modified. Dobson *supra* note 82 at 303.

⁹⁸ China’s recently announced “Medium to Long Term Science and Technology Development Plan, 2006-2020” speaks of a “Go West strategy” and has two bold aims: (1) to raise R&D intensity to the current

large sums into education and research.⁹⁹ As a consequence, the studies of a large number of young Chinese researchers in both Chinese and Western universities are being funded by the Chinese government, which gladly spends some of its trade surplus on creating a new Chinese intellectual force.¹⁰⁰ The government also invests another large portion of its trade surplus into building research institutions.¹⁰¹ The expectation is that these “intellectual” investments will result in an array of intellectual property originating in China helping the Chinese graduate from imitators to creators.

The Chinese book, *Chinese Intellectual Property Law in the 21st Century*, offers insights into Chinese views on intellectual property protection.¹⁰² It presents Chinese intellectual property laws in line with the TRIPS Agreement and discusses the technical and legal aspects of court cases and the enforcement of intellectual property laws. The authors describe a number of court cases that have dealt with the disputed protection of intellectual property in order to show that the Chinese legal system is serious about

OECD average by 2020 (increasing spending as a share of GDP from 1.3% to 2.5%); and (2) targets for particular sectors “to reduce sharply reliance on imported technology, obtain advanced core technologies in the equipment manufacturing and the information industry, increase agriculture productivity and ensure national food safety, make a breakthrough in energy development, energy saving technology and clean energy technology and build several world-class science and research institutions and university and form a system for innovation that is characteristic of China” (Government of the People’s Republic of China, 2006) cited in Dobson supra note 82 at 305 and in OECD, “Measuring China’s Innovation system National Specificities and International Comparisons” (2009) STI Working Paper 2009:1 Statistical Analysis of Science, Technology and Industry 46 -64. See also generally Ministry of Science and Technology of the People’s Republic of China website, online at: <http://www.most.gov.cn/eng/index.htm> (for China’s S&T strategies, initiatives and policies).

⁹⁹The successes achieved by a certain number of East and Southeast Asian countries in the fight against poverty is largely explained by the massive investments they made in education and research and development (R&D) over several decades. See UNESCO infra note 160 at 19- 20. See also fn 118 in Chapter 1.

¹⁰⁰Ibid.

¹⁰¹The growth of R&D expenditure in China in the period 1995-2005 has been impressive, with an annual average growth rate of more than 18%, a rate much higher than that recorded in OECD countries. R&D intensity, measured as R&D expenditure as a percentage of gross domestic product (GDP), has also increased since 1995; however in an international comparison with OECD countries, the R&D intensity in China is still low. This gap is even larger if comparing the high-tech industries only. Ibid at 38 and 39.

¹⁰²Xue Hong, Zheng Chengsi, *Chinese Intellectual Property Law In the 21st Century* (Sweet & Maxwell: Asia, Hong Kong, Singapore, 2002).

intellectual property protection and is acquiring skill and experience in managing and resolving such cases.¹⁰³ Below are a list of sample cases from this book as well as from an official Chinese government website for English translations of Chinese statutes and cases.¹⁰⁴

COPYRIGHT CASES

*Huang Zhi Yi Deng v. Nanjing International Development Company*¹⁰⁵

The plaintiffs (Huang Zhiyi and Xu Lingzhi) sued the defendants for unlawfully copying a television advertisement they created for “Be le Electric Appliances.” They claimed that the defendants copied their “design and conceptual creation.” A panel of three judges sitting in the People’s Court found that “there exist obvious innate connections between the two [advertising programs]” and consequently found the defendants in violation of the plaintiff’s copyright. They ordered 25,548 Yuan in reparation.

¹⁰³ Intellectual property laws have only existed for less than 30 years in China. Recently, while it has been noticed that the judges sitting in the Beijing and Shanghai courts have rather sophisticated training in intellectual property laws, the same cannot be said for judges in the outer regions and provincial courts. The lack of intellectual property knowledge renders more difficult a legally sound judgment. Judges in China are generally behind their counterparts in the US in experience in basing their decisions on a reasoned rule of law and stare decisis, expertise on intellectual property matters, and independence from political influence and external meddling. The Chinese government had identified the need for 600,000 legal professionals. However, China’s legal education system only produces roughly 700 new attorneys a year. The need for formally trained attorneys in China is exacerbated by the growing rate of intellectual property-related lawsuits being filed in Chinese courts. Additionally, the lack of training among existing lawyers complicates the Chinese court proceeding that follows an inquisitorial system. There are however, some promising movements in China toward a professional class of lawyers. Chinese law schools include seminars on complex business and intellectual property issues. Also, Chinese lawyers are encouraged to seek out foreign legal education. See Brent Yonehara, “Enter the Dragon: China’s WTO Accession, Film Piracy and Prospects for Enforcement of Copyrights” (2002) *DePaul-LCA Journal of Art and Entertainment Law* 63 at 90 -93. See also Maria C.H. Lin “China after the WTO: What You Need to Know Now” (2001) 817 *PLI/Comm.* 177 at 185. See also Susan Finder, *The Protection of Intellectual Property Rights Through the Courts*, in *Chinese Intellectual Property Law and Practice* (Mark A. Cohen, A. Elizabeth Bang et al. eds., 1999) at 255, 260.

¹⁰⁴ Law Info China, online: www.lawinfochina.com

¹⁰⁵ Huang Zhi Yi Deng (Yuangao) He Nanjing Guoji Kaifa Gongsi Deng (Beigao) (<<unknown characters>>) [Huang Zhiyi v. Nanjing Int’l Dev. Co.](Nanjing Xuan Wu Dist. People’s Ct. Sept. 7, 1996).

*Beijing Huaqi Multimedia Corp. v. Shandong TV Station Beijing*¹⁰⁶

The defendants (Shandong TV Station) broadcast a television show produced by the plaintiffs without the plaintiff's authorization. The defendants claimed they had a broadcasting contract with the plaintiff's agent; however, the Haidan District Court found that the agent had only a limited license to broadcast the show, and as they were not the original owners, had no right to license the contract out to the defendants. The Beijing No. 1 Intermediate Court affirmed the lower court's finding that the defendants failed to conduct due diligence to verify the scope of the contract. The court held that the defendants infringed upon the copyright owned by the plaintiffs and ordered the parties to enter mediation, which resulted in the defendants paying 720,000 Yuan to the plaintiffs.

*Liu Jingsheng v. Sohu Aitexin Information Technology (Beijing) Co.*¹⁰⁷

The plaintiff, Liu Jinsheng, who owned the copyright to his translation of Don Quixote, sued the defendants for infringement on the grounds that they operated and linked to three websites on which his translation appeared. The plaintiff approached the defendant to cease linking to the three sites, which the defendant refused. The defendants argued they were not liable as they only operated and linked the websites and were not responsible for content. The court rejected the defendants' argument and held that they "caused the aggravation of the infringement." As a result, they were ordered to pay 3,000 Yuan and provide a written apology to the plaintiff.

¹⁰⁶Beijing Huaqi Multimedia Corp. v. Shandong TV Station Beijing Hua Qi Duomeiti Zhizuo Youxian Gongs, Zhongguo Luyin Luxiang Chuban Zong She Su Shandong Dianshitai Qinfan Zhuzuoquan Jiufen An (<<unknown characters>>) [Beijing Huaqi Multimedia Corp., China Audio, Video Publishing House v. Shandong TV Station] (Beijing Interm. People's Ct. Aug. 27, 1998).

¹⁰⁷ Liu Jing Shengsu Souhu Ai Te Xin Xinxi Jishu (Beijing) Youxian Gongs, Qinfan Zhuzuoquan Jiufen An (<<unknown characters>>) [Liu Jingsheng v. Sohu Aitexin Info. Tech. (Beijing) Co.] (Beijing Interm. People's Ct. Dec. 19, 2006)

TRADEMARK CASES

*Beijing Delifrance Food Co. v. Beijing Sun City Shopping Mall*¹⁰⁸

The plaintiff, Beijing Delifrance, owned the Delifrance trademark registration for bread products and distributed its bread to the defendant, Beijing Sun City, to be sold under the Delifrance trademark. The defendant stopped purchasing bread from the plaintiff but continued selling other bread products under the plaintiff's trademark. The Beijing Intermediate Court found the defendant to have infringed the plaintiff's trademark since the goods associated with it were similar and ordered the defendant to pay 14,897.21 Yuan.

*Bi Feng Tang Company v. De Rong Tang Company*¹⁰⁹

The plaintiff claimed rights to the trademark, Bi Feng Tang, in Shanghai, as it heavily advertised its catering services in association with the name. It alleged that the defendant infringed its trademark by using the name in its dining halls and its advertising campaigns, thereby misleading the public. The Shanghai Intermediate Court found that the name Bi Feng Tang was the general name of a cooking method or the name of a dish and was not a distinctive mark of the plaintiff's catering services and therefore held that the plaintiff had no right to prohibit others from using the label.

*Nanjing Xuezhong Caiying Co. v. Shanghai Xuezhong Caiying Co.*¹¹⁰

¹⁰⁸ Beijing Bali Da MofangShipinYouxianGongsi Su Beijing Taiyang Cheng ShangchangShangbiaoQinquanJiufenAn (<<unknown characters>>) [BeijingDelifrance Food Co. v. Beijing Sun City Shopping Mall] (BeijingInterm. People's Ct. Oct. 30, 1993) .

¹⁰⁹Bifeng Tang Gongsi Su De Rong Tang Gongsi Bu ZhengdangJingzhengJiufenAn (<<unknown characters>>) [Bi Feng Tang Co. v. De Rong Tang Co.] (Shanghai Higher People's Ct. June 18, 2003).

The plaintiff, the Nanjing Xuezhong Caiying Company, registered the trademark “Xuezhong Caiying” for wedding photography services. The plaintiff has received several prestigious awards for its photography and it has been widely recognized by the public. The defendant used the same mark for identical wedding photography services. The plaintiff therefore brought an unfair competition and trademark infringement action against the defendant. The Nanjing Intermediate Court found that the defendant infringed the plaintiff’s mark as it created confusion in the mind of the consumer, especially as the mark was well known. The court ordered the defendant to stop using the mark and awarded damages of 20,000 Yuan to the plaintiff.

PATENT CASES

*Renda Building Materials Factory v. Xinyi Company*¹¹¹

The plaintiff, Renda Building, who owned the exclusive license to a patent for a “concrete thin-walled tubular member” sued the defendant for manufacturing a product similar to the patented invention. The Intermediate Court of Dalian Municipality held that there were no essential differences between the patent and the alleged infringing product and ordered the defendant to pay 100,000 Yuan for the losses incurred by the plaintiff. The decision was upheld by the Liaoning Higher Court, but overruled by the Supreme People’s Court on grounds that the lower courts erred in finding certain technical features to be equivalent between the patented product and the accused product.

¹¹⁰ Nanjing XueZhongCai Ying Gongsu Shanghai XueZhongCai Ying Gongsu Ji Qi Fen Gongsu Shangbiao Qinquan, Bu Zhengdang Jingzheng Jiufen An (<<unknown characters>>) [Nanjing Xuezhong Caiying Co. v. Shanghai Xuezhong Caiying Co.] (Jiangsu Higher People's Ct. Aug. 26, 2005).

¹¹¹ Ren Da Jiancai Chang Su Xin Yi Gongsu Zhuanli Qinquan Jiufen An (<<unknown characters>>) [Renda Bldg. Materials Factory v. Xinyi Co.] (Sup. People's Ct. Aug. 22, 2005) (Lawinfochina).

*Dayang Company v. Huanghe Company*¹¹²

The plaintiff, Huanghe Company, and the defendant, Dayang Company, entered into a patent licensing agreement to exploit Huanghe's patent for stone cutting, pressing, and mounding machines. The plaintiff sued to have his money returned and alleged that the contract was invalid because the patent at issue illegally monopolized the technology and impeded future technological progress. The Supreme People's Court held that the patent and the patent license were valid.

The above-described list of cases indicates that the Chinese legal system is serious about protecting intellectual property by acquiring experience and skill in resolving intricate and complex domestic cases, contrary to the widely held belief that IP protection is virtually non-existent in China. The presented cases also suggest that both the Chinese judicial system and Chinese litigants understand the fundamental legal concepts of IPR in the areas of copyrights, trademarks and patents. The cases show that the courts treat IPR as private rights with monetary value and are willing to impose remedies to compensate for infringement.

For example, the copyright cases show that the courts understand ownership over copyrighted works such as advertisements, translations and broadcasts, and that unauthorized copying should be remedied with damages equivalent to the loss. The trademark cases deal with fundamental issues such as trademark requirements, whether use creates consumer confusion if a similar mark is used in connection with similar goods, and the legal rights attached to well-known marks.

¹¹²DayangGongsi Su HuangheGongsiZhuanliShishiXukeHetongJiufenAn (<<unknown characters>>) [Dayang Co. v. Huanghe Co.] (Sup. People's Ct. June 16, 2004).

In the case of patents, there is a clear understanding that patent rights can be exploited through licensing, and there is an understanding by the parties and courts involved that such rights cannot be unnecessarily restrictive as demonstrated through their acknowledgment of defenses such as the doctrine of equivalents and patent invalidity. The fact that in many of these cases there were appeals to the highest courts shows that Chinese IPR owners will utilize the fullest extent of the judicial system to enforce their rights.

An important point to draw from this list of cases is that often both the parties involved are Chinese, which is consistent with the previously discussed implication that the Chinese government has an interest in applying intellectual property laws to local business practices, perhaps more so than foreigners.¹¹³ In fact, statistical data reveals that less than 5% of all intellectual property cases are filed by foreign intellectual property owners, which may be a reflection of the Western perception that IPRs are unenforceable in China.¹¹⁴ Furthermore, most cases are from the Eastern regions of China, which is already relatively well developed compared with the rest of the country.¹¹⁵ This has important implications for IPR protection.¹¹⁶ It seems that alongside successful development, as that seen currently in Eastern China, IPR are taken seriously and are

¹¹³ These cases reflect Wechsler's observation that the times have passed in which China's motivation for implementing IP laws was to gain favorable trading partnerships with Western countries. She observes that recent developments in Chinese IP policy and reform are the result of the Chinese drive to excel in S&T and to become the world's innovation leader with the help of its IP protection regime. See Wechsler supra note 56 at 44.

¹¹⁴ In 2006, only 353 of 14,219 IP cases of first instance involved foreign litigants. See Ministry of Commerce of China, *Report on China's Intellectual Property Protection in 2006* (2007, online :http://www.chinaipr.gov.cn/policyarticle/policy/documents/200706/236401_1.html).

¹¹⁵ "East West Gap Widening" *Global Times*, (25 Feb.2010) online at <http://business.globaltimes.cn/china-economy/2010-02/507862.html>

¹¹⁶ China has reached the point where the stimulating effects of IPRs will influence different sectors and stakeholders quite differently, depending on the extent to which they are still driven by imitation-related innovation or investments in basic, or at least relatively original, R&D. Reichman supra note 79 at 1125.

afforded part, if not full, protection.¹¹⁷ Thus, perhaps it is through successful economic development that the problem of intellectual property protection can be resolved rather than through a purely - and sometimes heavy-handed - legislative approach.¹¹⁸

The reality, however, is that Western multinationals lack the local decision-making power to make changes in China.¹¹⁹ For instance, “should the US go after China on non-enforcement grounds, the TRIPS Agreement might be on China’s side. Under Article 41(5) of the Agreement, a WTO member state is not required to devote more resources to intellectual property enforcement than other areas of law enforcement.”¹²⁰ In this vein, China arguably has urgent legal tasks of a greater importance compared with the enforcement of intellectual property laws.¹²¹ Yu also states that any threats by the US

¹¹⁷In some industry branches, Chinese industries have reached a level of development that forces them to learn the rules of the IP game in order not to lose out. In almost all industry branches, Chinese companies are increasingly adopting proactive IP protection strategies by not only proactively filing and registering IPRs but also by proactively taking international companies to Chinese courts. These examples demonstrate that the Chinese government has made considerable progress towards industrialization, modernization, and the localization of value-added production, although there is varying progress depending on the industries and sectors concerned. The Chinese realization that the effects of IP protection are extraordinarily sensitive to country and industry specific circumstances has to the increasingly extensive use of IP policy space by the Chinese government. This progress is now reinforced by the adoption of IP policies that foster national innovation and development. Wechsler supra note 63 at 43.

¹¹⁸ See Yu, Episode II, Supra note 1 at 105.

¹¹⁹ Coercion as a dominant long-term strategy cannot eliminate intellectual property infringement. Illegal reproduction of protected goods and works in the BRIC economies remains commonplace. Coercion as a dominant US political strategy has failed to significantly curb global intellectual property piracy. One author who studied twenty international crises between 1905 and 1971 concluded that “if our results suggest anything, it is that an assertive, bullying, strategy is both less effective and more risky than much of the folklore of power policies would have it.” The first and probably the most obvious reason that coercion fails is because it provokes retaliation by the targeted state. For example, when the US threatened to impose sanctions against China because of its lack of protection for intellectual property, China responded by transferring an airplane purchase order worth \$1.5 billion from a US company to a European competitor. China and the US have participated in a continuous cycle of threats of sanctions, followed by negotiations, and resolutions. China has proved that it is willing to threaten countersanctions when it feels its “sovereignty” or “national dignity” has been threatened by American demands for increased intellectual property enforcement. See Robert C. Bird supra note 68 at 335.

¹²⁰ See Yu Episode II, supra note 1 at 133.

¹²¹ “Instituting strong IPR rights would require monumental and extremely high cost to the Chinese government.” See Wu Supra note 88 at 40. According to Homere, more specific costs of a patent system include:

to launch a trade war against China would provoke counterthreats and that such an emotional decision would accomplish nothing:¹²² “The[se] threats also create resentment among the Chinese people while inflicting collateral damage on the US’ long standing interests in promoting free trade, human rights, and the rule of law.”¹²³

The reality is that neither the US nor any other foreign country can effectively influence the misuse of IPR by Chinese businesses.¹²⁴ The same is true for the Chinese government, which has neither the resources nor the staff sufficient to change and control the attitudes of Chinese businesses towards IPR. This especially holds true for businesses in the vast regions of Central and Western China. This is due to many factors, including the fact that the overall legal system is still developing, government agencies charged with enforcing the IP laws have limited resources, and the vast majority of the judiciary

“Most patents granted by developing countries and LDCs are granted to foreigners. Often, foreigners secure patents in a developing country or an LDC not for the purpose of developing that particular technology in that country but rather to prevent other competitors from making or selling the patented invention in that country. Thus, the grant of exclusive rights to foreigners often increases the administrative costs and the costs to get the patented product to consumers in that poorer country and seldom results in foreign investment and technology transfer. Consequently, the net social cost of granting the majority of a developing country or LCD's patents to foreigners tends to exceed the net social benefit of that patent system in that country. Further, FDI changes the demands for labor in each country and imposes the cost of technology transfer on developing countries by requiring the countries to train unskilled workers in order to meet the greater competition.

See Homere’s additional comments at Supra note 68.

¹²² See Yu, Episode II, supra note 1 at 122. See also Bird, supra note 69.

¹²³ Ibid. at 123.

¹²⁴ Coercive tactics fail to address the underlying causes of rampant intellectual property piracy in developing countries. Coercive sanctions do not address, but rather may exacerbate, the poverty and unemployment in developing countries that makes the production of pirated goods and the purchase of illegal patented drugs so tempting. No matter how coercive sanctions may be, strong incentives still remain in place to sell and purchase pirated goods. See Bird supra note 68 at 339. See also supra note 93, discussing the development goals a country must reach before it meets the “threshold” level of development necessary to participate and gain from the incentives provided by IP protection. Rafik lists three criteria: First, an LDC needs a literate work force and the existence of trained scientific and technical personnel to attract foreign investment, utilize transferred technology, and implement and sustain domestic inventive ability. Second, a level of industrialization and industrial infrastructure sufficient to support an IP regime is essential. Thirdly, base levels of domestic capital mobilization rates and levels of entrepreneurship must be in existence. This industrialization include the overall annual growth rates in GNP, the annual growth rates in industry and manufacturing sectors, per capita energy consumption, and annual energy production." See Bawa supra note 88 at 108-109 .

does not have the training to effectively handle IP-related disputes.¹²⁵ According to Newby, “Foreign investors should be warned . . . that China’s legal reforms have exceeded its enforcement abilities. Although China seems committed to its reforms, it still lacks the legal infrastructure to competently and efficiently handle intellectual property disputes. Moreover, Beijing’s ability to enforce its intellectual property regulations is seriously hampered by local resistance to change, particularly when local authorities sense that such change will take power out of their hands.”¹²⁶

Chinese businesses behave in much the same ways as do domestic businesses in other developing countries. One of the differences between China and smaller developing countries, however, is that China is capable of resisting foreign pressure that can force domestic businesses into permanently disadvantageous positions. Indeed, China is currently in a similar position to that of the US at the beginning of the 19th century when it was a developing country. At that time, US businesses disregarded the IPR of European countries, leaving the Europeans in a powerless position.¹²⁷ It is no surprise that the US

¹²⁵ See Mendel, Fraser, “The Outsourcing Revolution 2004: Protecting Critical Business Functions: Off shoring to India, China and Elsewhere” (2004) Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series at 501. See also supra note 103.

¹²⁶ Kim Newby, “Doing Business in China: How the State of 1.3. million can Tap the Nation of 1.3. Billion” (2004) 19 Maine Bar J. 238 at 241.

¹²⁷ Consider the following excerpt from Sell:

Historically, the US had lax IP policies:

Some technology was obtained despite foreign intellectual property claims. For example, in the early days of steam engine technology, Britain forbade the exports of engines, parts and skilled personnel. The US imported all three regardless. Recognition of British rights might have yielded a net benefit to the US but that is doubtful. The decision was made in the US that at that stage of economic development, that the best policy for the US was lax enforcement of foreign intellectual property.” (Quoting Merges, “Battle of the Lateralisms; Intellectual Property and trade” 8-2 Boston University International Law journal at239-246.)

This preference for weak enforcement changed in the latter half of the 19th century when US firms began to achieve significant technological breakthroughs. The US commitment to very strong and extensive patent protection emerged only as recently as 1982. Throughout much of the 20th Century, US courts were concerned about abuses of monopoly power. It was only in the early to mid 1980’s that the courts stopped referring to patents as “monopolies.”

The historical perspective provides support for differential treatment for countries in the earlier stages of industrial development. See Sell at 178.

only began to embrace intellectual property laws when they became a developed industrial nation.¹²⁸

It is important at this point to note that not all Chinese enterprises operate in the same fashion on this issue. For example, there is a marked difference between state-owned enterprises in China and larger Chinese private enterprises that can afford to legally acquire intellectual property compared with small and medium-sized firms. Because the former typically operate in the high-tech sector, which makes them similar to Western corporations,¹²⁹ it is in the interests of all parties to act in accordance with internationally accepted IPR laws. (One example from 2007 is IBM licensing chip technology to China's biggest chip-maker.)¹³⁰

By contrast, the majority of small and medium-sized businesses do not have the means to develop a competitive edge through proprietary technology and thus these firms welcome foreign businesses into the Chinese market because they also import their intellectual property. By copying foreign competitors' technology, design and trademarks, small-sized Chinese businesses not only remain competitive, but also achieve an attractive level of growth for two reasons: they pay their workers less than do their foreign counterparts¹³¹ and they sell the copied products at lower prices compared with the manufacturers of the original products.¹³²

¹²⁸ Ibid.

¹²⁹ See Pepe Escobar, "Selling China to the World" *Asia Times* (15 Jan. 2005) Online: <http://www.atimes.com/atimes/China/GA15Ad01.html> (discussing several successful high tech SOE's)

¹³⁰ "IBM licenses chip technology to China's semi-conductor" *The Ottawa Citizen* (27 December 2005) at C-6 (on file with author).

¹³¹ For example, comparing a domestic firm and a typical foreign firm (with 58% foreign share) the annual wage for engineers in a foreign firm is 18% (or RMB 2,520) higher than in a domestic firm, while the wage for managers is 20% (or RMB 2,761) higher. See Galina Hale and Cheryly Long, "FDI Spillovers and Firm Ownership in China: Labor Markets and Backward Linkages" (2006), Federal Reserve Bank of San Francisco Working Paper Series at fn20.

¹³² See supra note 84.

However, those enterprises in developing countries that use knowledge or technology to achieve higher levels of productivity regardless of whether they are protected by intellectual property laws share one common attribute: they operate in low-technology, pre-industrial economies.¹³³ In the past, such economies have not deployed sophisticated legislation to protect their own technological developments; rather, when businesses in these economies acquired knowledge of significant commercial value, they protected it through secrecy.¹³⁴ When trade secrets were acquired by others, it was thus considered lawful to use such knowledge without paying for it.¹³⁵ The legal concept of intellectual property was created by developed societies because in such economies the creation and ownership of knowledge is often more important than is that of material

¹³³ A low-tech pre-industrial economy depends on traditional assets: land, raw material and human labor. This is in contrast to an economy that is driven by intangibles and knowledge. China, although transforming rapidly, is still dominantly a low-tech pre-industrial economy. An interesting quote by Mr. Cho, Tak Wong, president of Fuyao Glass Industry Group is illustrative: “Per capita GDP of China is 1/10 of the US. The importance of the wealth gap in China leads us to estimate that it will take 100 years for China to catch up with the US. 100 years ago the rural population was 60% of the total population of the US, this is the case for China today. 100 years ago in the US there were 500 car manufacturers, now there are only 3. So it will take a long time to catch up with the US, at least on a macro level.” See Plenary Session, “Global Dimension of China’s Domestic Growth” Annual Meeting of the New Champions 2009, Dalian, 10-12 September. Another study showed that in 2005 foreign firms produced 90% of China’s exports of computers, components, and peripherals and 71% of exports of electronics and telecommunications equipment. In consumer electronics and IT hardware the domestic value added in China’s exports is still only 15% (as of 2006). Moreover, China’s high market share in the trade of high-tech industries is likely due to the fact that China became a more integrated part in the international production chains, where many unfinished high-tech products are imported to be assembled by the low-cost workforce in China and then re-exported. Assembly work in high-tech industries is in fact relatively low- or mid-tech work. Most patents in China belong to foreign residents. See also Loschky, Alexander “High Technology Trade Indication 2008: An International Comparison of the Big Economic Areas and Countries” (2008) (EU:JRC Scientific and Technical Reports) at 10 and 24. See Dobson, *supra* note 82 at 306. See also fn 118 in Chapter 1.

¹³⁴ See Priest, *supra* note 87 at 800-808. See discussion in Chapter 2, Section 1 above chronicling the parallel evolution of IP with industry.

¹³⁵ *Ibid*

property.¹³⁶ Today, industrialized economies owe their levels of growth to knowledge more than they do to material property.¹³⁷

In low-technology, pre-industrial economies, the widespread distribution of knowledge is considered to belong to society as a whole. Thus, success in business depends mainly on material property and the skills necessary for buying and selling material products.¹³⁸ Consequently, in pre-industrial economies, stealing refers to taking other people's material property; using publicly available knowledge is not considered to be stealing because the original owner still has the knowledge and can still use it.¹³⁹

This mentality is consistent with the notion that the creation of new knowledge that has commercial value is relatively rare in pre-industrial economies; innovation is rare, and when it occurs the reward is respect and status in society.¹⁴⁰ It is arguable that

¹³⁶ Ibid.

¹³⁷ Innovation is the hallmark of the economies of the OECD countries. Developed countries typically devote one percent to three percent of their annual GNP to the research and development needed to produce new technologies. "Estimates suggest that forty percent of the growth in per capita GNP in the US from 1929 to 1957 is due to technological change." See Bawa supra note 88 at 84. See also generally Michael P. Ryan, "Knowledge-Economy Elites, the International Law of Intellectual Property and Trade, and Economic Development" (2002) 10 *Cardozo J. Int'l & Comp. L.* 271. In the case of China, in international comparison with OECD countries, the R&D intensity (measured as R&D expenditure as a percentage of gross domestic product (GDP)) is still low. This gap is even larger if comparing the high-tech industries only. See supra note 182 OECD, "Measuring China's Innovation" supra note 107 at 39.

¹³⁸ See discussion in Chapter 2, section 1 above.

¹³⁹ According to Posner, in a low-tech pre-industrial economy, the social cost of protecting an innovation would outweigh the benefit of freely sharing it, particularly because of the nature of intellectual property - it does not get worn out with repeated use. Landes, *W.M.*, Posner, *R.A.*, *The Economic Structure of Intellectual Property Law* (US: Harvard, 2003) in chap 1. This has been proven in the behavior of developing countries, for whom it makes little moral sense, from the point of view of a country struggling to enhance the standard of living of its citizens, to withhold the benefits of a socially beneficial product for the sake of rewarding its creator. See Bawa supra note 88 at 97.

¹⁴⁰ The products of innovative activity are believed by developing economies to be the common heritage of all and for the common benefit of all. For example, it was seen that, for a less developed country, it made no sense to reward an innovator for the fruits of his or her labor when the consequence of doing so would be to restrict the dissemination of a useful invention or creative work that would help the country escape its lesser developed status. These aspirations gradually transform as a country reaches the threshold level of development. This distinct difference in moral ideology forms a ridge between the North and South that, unfortunately, too often goes unnoticed. It may be that a philosophical dimension underlies much of the economic and political rhetoric that is the focus of the international IP debate. Without recognizing its importance, or for that matter its existence, the movement toward a compromise is bound to grind into deadlock. See Bawa supra note 88 at 96.

Western businesses are too cynical to realize that Chinese firms respect them for their capacity to develop knowledge and know-how and thank them for allowing it to be transferred without cost - albeit illegally.

Globalization has also changed the degree of knowledge transfer between developed and underdeveloped societies. When Europeans first conquered lands and created colonies, they dominated undeveloped nations so completely that domestic and European economies were kept separate.¹⁴¹ At that time, the relationship between the advanced and the less advanced was one-sided. The Europeans were the exploiters, while the people of the conquered nations were exploited.¹⁴² There was no noticeable degree of technology transfer from Europe.¹⁴³ For instance, England governed India for many years without transferring any industrial technology to the Indian economy.¹⁴⁴ Likewise at the end of the 19th and beginning of the 20th centuries when a significant part of China was dominated by the West and Japan.¹⁴⁵ The only transfer that took place in those days resulted in the destruction of domestic Chinese businesses and made Chinese poverty appear even worse.¹⁴⁶

The difference between the time when industrial powers dominated and modern economic relationships between nations is that today's relations are no longer one-sided.

¹⁴¹ Former European colonies that adopted strong IPR rights remain highly dependant on international trade, often with these same developed countries.. Ian Inkster, "Colonial and Neo-Colonial Transfers of Technology: Perspectives on India before 1914" in ed. Roy MacLeod and Deepak Kumar, *Technology and the Raj: Western Technology and Technical Transfers to India, 1700-1947*, (New Delhi: Sage, 1995) at 34-43. See Ian Derbyshire, "The Building of the India's Railways: The Application of Western Technology in the Colonial Periphery 1850-1920," in *Technology and the Raj*.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ British colonial rule imposed restrictions on technological development in South Asia. In the case of the Indian railway network, historians such as Ian Inkster and Ian Derbyshire have asserted that the rigidity of colonial policy debilitated rather than motivate industrial development in British India during the latenineteenth century. See Inkstar, *supra* at 34

¹⁴⁵ *Ibid.* See Garnet, *supra* note 14 and 20.

¹⁴⁶ *Ibid.*

The real novelty of the globalization process is that the relationship between industrialized and developing countries is two-sided, namely that economic globalization will succeed only if it serves the interests of both sides. Perhaps weaker developing countries may ultimately stand to gain the most.¹⁴⁷

The example of China is interesting in this context. China has been able to resist the pressure of making a low-technology, pre-industrial economy emulate a high-technology one.¹⁴⁸ Modern day China is less likely to believe in radical changes and has instead shown that it prefers a slow, orderly and challenging way of developing its

¹⁴⁷ As Reichman observes:

As it often happens in international law, efforts to rig a regime for short-term advantages may turn out, in the medium- and long-term, to boomerang against those who pressed hardest for its adoption. In my very first article on this subject, I warned that by reaching for high levels of international protection (that could not change in response to less-favorable domestic circumstances), technology-exporting countries risked fostering conditions that could erode their technological superiority and resulting terms of trade over time. As more technology-importing countries discovered and cultivated their own innovative strengths and capacities, they would benefit both from the worldwide system of incentives and protections that the TRIPS Agreement had established, as well as from location and other endowment factors, at the expense of leading developed countries that took their own technical superiority for granted. In short, given the "incipient transnational system of innovation" that had begun to emerge from the TRIPS Agreement, there was every reason to expect that the BRIC group as a whole, and many other emerging economies, would gradually become major competitors in the knowledge economy itself, with growing potential to match and challenge the advanced OECD countries' pre-existing comparative advantages in this area."

See Reichman supra note 78 at 188.

¹⁴⁸ Various studies conclude that a developing country has to reach a "threshold" level of development before domestic enterprises can participate in and gain from the incentives provided by IP protections. "Below Certain levels of developmental thresholds, the introduction of high levels of intellectual property protection will not generate positive impacts (as was evidenced by the extension of transitional periods available for least-developed countries)." See Gervais, "Clusters and Assumptions" supra note 68 at 2360. At this threshold level, per capita GNP is high enough for citizens to purchase goods at prices comparable to those of developed countries. Industrial infrastructures and local entrepreneurialism have developed to the stage at which piratical industries are replaced with innovative industries which are themselves reliant on IP protection. While the social benefit of an innovation continues to be seen as an important interest to balance, the scale may tilt more in favor of increasing incentives to innovate and rewarding the fruits of labour. See Bawa, supra note 88 at 108. Some suggest that education may be the most important element of the threshold: "Above all, reflection upon knowledge societies and how to build them makes it possible to rethink development itself. . . . By giving knowledge an unprecedented accessibility, and by engaging in capacity-building for everyone, the technological revolution might help to redefine the end goal of human development. . . . knowledge is a potent tool in the fight against poverty. . . . in this perspective, the idea of knowledge societies cannot be reduced to a vision of the North - it can also constitute a new, relevant development approach for the countries of the South." See United Nations Educ., Sci. & Cultural Org. (UNESCO), *Towards Knowledge Societies* (2005) at 19-20, online at: <http://unesdoc.unesco.org/images/0014/001418/141843e.pdf>.

economy and of gradually transforming into a developed industrial society.¹⁴⁹ They promote and enforce intellectual property laws when their enterprises and economic segments reach a level of development at which intellectual property protection makes sense and serves specific individual as well as common interests.¹⁵⁰ For instance, as we saw in the case of Chinese IP litigation or larger Chinese firms, where Chinese industries have reached a level of development, it is in the interest of all parties to learn the rules of the IP game, indicating that the Chinese government has made considerable progress towards industrialization and modernization.

As for the vast regions of low-technology, pre-industrial economies in China, instead of imposing foreign laws, the Chinese wisely use their resources to speed up the development of their businesses into more sophisticated, high-tech enterprises.¹⁵¹ However, pre-industrial businesses still expect assistance from resource-rich foreigners. By taking advantage of foreign knowledge, Chinese firms systematically progress towards the technological heights of their foreign guests.¹⁵² It seems as though foreign

¹⁴⁹Deng Xiaoping believed in reform as a sequencing process, slow and balanced. His strategy involved a gradual exploitation of international markets, the taming of multinational corporations, the education of the Chinese people, the serving of Western markets, and the creation of competitive organizations. Deng Xiaoping focused on human resources rather than on natural resource cartels, which was the strategy of the New International Economic Order of Third World countries. See “Piracy of Intellectual Property in China and the Former Soviet Union and its Effects upon International Trade: A comparison” (1998) Buffalo Law Review at para. 7. Indeed, the Chinese "open door" economic policy that people speak of is not quite like it sounds; it is more like a heavy bank vault door that in 1979 was opened one millimeter, and since then has opened inches at a time. Over the past thirty years, the Chinese have made tremendous economic progress, but it is slow and considered progress because they seek to manage it in a way that permits their domestic economy to grow without creating a serious threat of social upheaval in the process. See Hindman supra note 64 at 18.

¹⁵⁰Recent years have exposed a very specific Chinese approach to IPR regime-building which has been termed “gradualism” by Kong Qiangjiang, meaning the adaptation of the standards for IP protection to the level of economic development in China. See Wechsler supra note 63 at 40.

¹⁵¹Ibid. See also supra notes 126 to 131.

¹⁵²Most recently, Chinese firms have moved from unprecedented success in competition within an imitation paradigm towards a competitive paradigm in which creation is central. It was argued by Wei Xie and Steven White that China has entered a new phase of technological development in which Chinese firms are adopting new modes of technological learning which will help them graduate from imitators to creators provided a number of conditions are fulfilled, i.e. that the absorptive capacity of Chinese firms improves,

firms are paradoxically playing the most significant role in helping pre-industrial Chinese businesses morph into industrialized enterprises. Some foreigners see this notion as positive because at the point at which low-tech businesses transform into sophisticated enterprises, they will be forced to adhere to intellectual property laws. For instance, the following statement is famously attributed to Microsoft founder Bill Gates:

“Although about three million computers get sold every year in China, people don’t pay for the software. Someday they will, though. And as long as they’re going to steal it, we want them to steal ours. They’ll get sort of addicted, and then we’ll somehow figure out how to collect sometime.”¹⁵³

Gates describes an important phenomenon in the statement above, namely that nations that are shifting from pre-industrial to industrial economies, at the beginning of the process, ignore IPR as those rights are not part of their social and economic lives and are not incorporated into their social and business ethics. It can, and will, change when today’s developing nations become developed ones.

The issue of the misuse of intellectual property during the process of globalization is thus essentially an economic and social problem rather than a legal one.¹⁵⁴ As a social and economic problem, it can be solved with social and economic development at which

provided that their ability to identify a potential source of technology improves, and provided that competitive pressures in industries dominated by state-owned firms increases. See Wechsler supra note 63 at 43. Even now, Asian entrepreneurs want their own exports of knowledge goods protected in the developing countries whose markets they increasingly penetrate through foreign direct investment (FDI), licensing, or sales of high-tech products. They also want to maintain flows of FDI and market-driven technology transfer into their own countries, in order to bolster their growing technological capacities. See Reichman supra note 78 at 1123.

¹⁵³ See Yu, “Episode II”, supra note 1 at 176 citing Brent Schlender et al., “The Bill & Warren Show” (20 July 1998).

¹⁵⁴ Consider the comment made by Sodipo:

“The adoption of minimum standards prescribed by TRIPS should improve the “law in the Books”, and thereby address the legal factors militating against the curbing of piracy and counterfeiting. It is, however, argued that corresponding attention should also be given to the “law in the Streets”, the economic and social factors which may influence effective enforcement of the laws in a post-TRIPS era.

See Bankole Sodipo, *Piracy and counterfeiting: GATT TRIPS and Developing Countries* (U.K., London: Kluwer Law International, 1997) at 5.

point, the protection of IPR will become a strictly legal issue.¹⁵⁵ Indeed, China serves as a good example of this gradual approach to implementation.¹⁵⁶ The process of this still-developing nation has demonstrated how economic and social measures can be combined with legal measures, and how the legal system can take over the problem of protecting and enforcing IPR at the point when economic development reaches a certain threshold.¹⁵⁷

Clearly, foreign enterprises need to understand the nature of the environment in which they operate as well as the process of globalization in which they participate. Through this understanding, they may take a different approach towards “pirating.” They may rather view it as their contribution to the growth and transformation of developing nations. In some ways, the problem with IPR in China and in other developing countries is an inevitable part of that economic and social development. When China becomes a fully developed society, low-cost labor will be a relic of the past, and both foreign and Chinese corporations will have to adjust to the new and complex economic, social and political realities.¹⁵⁸

¹⁵⁵ Many developing countries initially view IP pirating as fuel for technological and economic development. There are often immediate and tangible economic benefits from piracy of IP, as domestic producers gain the ability to produce in-demand products and services while avoiding the burdensome R&D costs. This is especially true with certain types of technology that are becoming easier to copy. Later, when the country reaches a point in development where IP protection becomes advantageous, there will be an increased emphasis on the promotion and enforcement of IP rights. See Hindman *supra* note 64 at 478. See also Larry Pfeil, “Piracy in the Information Age: Effective Protection of Intellectual Property Rights” (1999) 8 *Currents: Int’l Trade L.J.* 17, 17.

¹⁵⁶ *Supra* note 161.

¹⁵⁷ *Ibid.*

¹⁵⁸ “Even now wages are going up in China. They’re trying to manage it so that eventually they enter this higher value added production and exploit those benefits as well, because they have a highly trained labor force and they want to use that so that these people become innovators, these people become managers, they create the new ventures that will threaten what are the existing incumbents in the global marketplace, the corporations in the developed world.” See Yueh, *supra* note 85 at 84.

CONCLUSION

Globalization is not only a new name for changing international economic relationships; it is also a label used to identify the changing nature of economic relationships between nations. The main characteristic of globalization is that it facially recognizes every nation as a legitimate partner in the process of spreading the “industrial revolution” as well as the high-tech revolution. Because the relationship between US multinational corporations and China is central to the globalization process, this work has focused on one aspect of the US-China relationship, namely intellectual property protection.

Industrialized countries participate in that process because it offers them vast new markets for low cost labor and an opportunity to develop new markets for their goods and services. Developing countries embrace globalization as an opportunity to acquire technology and business knowledge from highly developed corporations. As discussed, the sticking point in the entire process is that the owners of intellectual property expect it to be protected by intellectual property laws and to be beyond the reach of firms in pre-industrial economies, except at a price and under the conditions determined by them.

Owing to differing interests between the developed and developing world, IPR holders have quickly found that economic globalization might not be all that consistent with their expectations of control over their intellectual property when entering low-tech, pre-industrial markets. The difficulty with intellectual property protection in China has long been the least successful and least agreeable aspect of the US-China relationship. US corporations and the US government believe that as a superpower their laws must be abided by. The Chinese, regardless of whether they share the American view, need US

businesses, their capital, their equipment, their business knowledge and their intellectual property. As a result, they have shown a willingness to adjust their business laws, especially their intellectual property laws, to conform to international standards. Moreover, they have made an honest effort to implement those laws. However, China has quickly discovered that correcting the behavior of its low-technology, pre-industrial businesses in terms of enforcing international intellectual property laws is an altogether more challenging task.

As a result, the legal system handles intellectual property issues much better in those segments of the Chinese economy that have achieved a level of sophisticated production. With respect to the majority of low-technology, pre-industrial Chinese businesses, the government focuses its resources on economic and social development rather than on what could be perceived as futile legal action. Many foreign businesses also realize that the most pragmatic approach is to convert low-level firms that have dubious business ethics into more sophisticated industrial partners.

Moreover, some Western businesses have finally discovered that whatever the “low-tech pirates and thieves” do, might serve their long-term interests as much as it serves Chinese interests if it leads to faster and better development in China and a better, if slower internalization of IP rules. Perhaps both sides are moving in the same direction, which will take them to the same conclusion, namely that low-tech behavior and the low-technology, pre-industrial economy cannot be controlled by laws imported from high-tech societies and that the only way to end the infringement of IPR is to transform low-tech economies through economic and social means.

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